# DOCKET

No. 07-411
Title: Plains Commerce Bank, Petitioner
v.
Long Family Land and Cattle Company, Inc., et al.
Docketed: September 26, 2007
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (06-3093)
Decision Date: June 26, 2007
Questions Presented

| ~~~Date~~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Sep 21 2007 | Petition for a writ of certiorari filed. (Response due October 26, 2007) |
| Oct 11 2007 | Order extending time to file response to petition to and including November 26, 2007. |
| Nov 26 2007 | Brief of respondent Long Family Land and Cattle Company, Inc., et al. in opposition filed. |
| Dec 7 2007 | Reply of petitioner Plains Commerce Bank filed. |
| Dec 12 2007 | DISTRIBUTED for Conference of January 4, 2008. |
| Jan 4 2008 | Petition GRANTED. The brief of petitioner is to be filed on or before Thursday, February 14, 2008. The brief of respondents is to be filed on or before Wednesday, March 12, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court. |
| Jan 30 2008 | SET FOR ARGUMENT ON Monday, April 14, 2008. |
| Feb 13 2008 | Letter from counsel for the petitioner consenting to the filing of amicus curiae briefs in support of either party, or neither party filed. |
| Feb 14 2008 | Joint appendix filed. (Statement of costs filed) |
| Feb 14 2008 | Brief of petitioner Plains Commerce Bank filed. |
| Feb 20 2008 | Letter from counsel for the respondents consenting to the filing of amicus curiae briefs in support of either party, or neither party, filed. |
| Feb 20 2008 | Brief amici curiae of Idaho, et al. filed. |
| Feb 21 2008 | Brief amici curiae of Idaho County and Lewis County, Idaho, and Cass County and Mahnomen County, Minnesota filed. |
| Feb 21 2008 | Brief amicus curiae of Association of American Railroads filed. |
| Feb 21 2008 | Brief amici curiae of American Bankers Association, et al. filed. |
| Feb 21 2008 | Brief amicus curiae of Mountain States Legal Foundation filed. |
| Feb 21 2008 | Record received from the U.S.C.A. for the 8th Circuit. (1 envelope) |
| Mar 5 2008 | CIRCULATED. |
| Mar 12 2008 | Brief of respondents Long Family Land and Cattle Company, Inc., et al. filed. |
| Mar 19 2008 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Mar 19 2008 | Brief amicus curiae of United States filed. (Distributed) |
| Mar 19 2008 | Brief amici curiae of National Network to End Domestic Violence, et al. filed. (Distributed) |
| Mar 19 2008 | Brief amicus curiae of Cheyenne River Sioux Tribe filed. (Distributed) |
| Mar 19 2008 | Brief amici curiae of National American Indian Court Judges Association, et al. filed. |

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|---|---|
| | (Distributed) |
| Mar 19 2008 | Brief amici curiae of National Congress of American Indians, et al. filed. (Distributed) |
| Mar 31 2008 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Apr 4 2008 | Reply of petitioner Plains Commerce Bank filed. (Distributed) |
| Apr 7 2008 | Record for the U.S.D.C. for the District of South Dakota is electronically filed. |
| Apr 14 2008 | Argued. For petitioner: Paul A. Banker, Minneapolis, Minn. For respondents: David C. Frederick, Washington, D.C.; and Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) |
| Apr 29 2008 | Letter dated April 22, 2008 received from counsel for the respondent. (Distributed). |

# PETITION FOR WRIT OF CERTIORARI

68

Supreme Court, U.S.
FILED

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No. (1)

# In the Supreme Court of the United States

PLAINS COMMERCE BANK,

*Petitioner,*

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG, LILA LONG,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Indian tribal courts inherently lack jurisdiction to hear claims between members and nonmembers. In Montana v. U.S., 450 U.S. 544, 565 (1981), this Court identified two narrow exceptions. The first relates to regulation of nonmembers who enter into consensual relationships with the tribe or its members. The second relates to civil authority concerning activity that directly affects the tribe's political integrity, economic security, health, or welfare. This Court, however, has never upheld tribal-court, civil-adjudicatory jurisdiction over a nonmember defendant under the first Montana exception, and expressly left this question open in Nevada v. Hicks, 533 U.S. 353, 360 (2001).

The question presented is:

Whether Indian tribal courts have subject-matter jurisdiction to adjudicate civil tort claims as an "other means" of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member-owned corporation?[1]

[1] Petitioner made two additional arguments to the Eighth Circuit Court of Appeals that it is explicitly not asking this Court to review. Namely, that tribal courts lack jurisdiction to adjudicate claims based on federal law and that the tribal court's judgment should be denied comity because the Bank was denied due process.

## LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eighth Circuit.

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or publicly held company owning 10% or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

Plains Commerce Bank respectfully petitions this Court for a writ of certiorari to review the June 26, 2007 Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit. The circuit court affirmed the district court's grant of summary judgment for Respondents, holding that the Cheyenne River Sioux Tribal Court has subject-matter jurisdiction over Respondents' claims against Petitioner because of inherent tribal authority to regulate nonmembers' activities arising out of consensual relationships with tribal members.

## OPINIONS BELOW

The June 26, 2007 Opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at Plains Commerce Bank v. Long Family Land & Cattle Company, Inc., 491 F.3d 878 (8th Cir. 2007), and is reprinted in the Appendix to this Petition, pp. A-1 through A-23. The prior opinion of the United States District Court for the District of South Dakota, entered July 17, 2007, is reported at Plains Commerce Bank v. Long Family Land & Cattle Company, Inc., 440 F. Supp. 2d 1070 (D.S.D. 2006), and is reprinted in the Appendix to this Petition, pp. A-24 through A-44.

The prior decision of the Cheyenne River Sioux Tribal Court of Appeals, case number 03-002-A, entered November 22, 2004, is unreported, and is reprinted in the Appendix to this Petition at pp. A-45 through A-68. The prior decisions of the Cheyenne River Sioux Tribal Court, case number R-120-99, entered February 18, 2003, and January 3, 2003, respectively, are unreported, and are reprinted in the Appendix to this Petition at pp. A-69 through A-71 and pp. A-72 through A-83.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Federal courts have jurisdiction to review tribal jurisdiction pursuant to 28 U.S.C. § 1331, which provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

See Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 852-53 (1985).

## STATEMENT OF THE CASE

Petitioner Plains Commerce Bank ("Bank") is a South Dakota banking corporation. The Bank is wholly owned by tribal nonmembers. It loaned money to Respondent Long Family Land and Cattle Company, Inc. ("Long Company"), which also is a South Dakota corporation. Fifty-one percent of the Long Company is owned by Respondents Ronnie Long and Lila Long ("The Longs"), who are both members of the Cheyenne River Sioux Tribe ("CRST").

On December 5, 1996, the Bank and the Long Company entered into two agreements signed at the Bank's off-reservation offices: a loan agreement providing that the Bank would loan money to the Long Company upon certain conditions, and a two-year lease with the option to purchase certain ranching real estate on the CRST reservation owned

by the Bank, which had served as collateral for the Bank and was transferred to the Bank in lieu of foreclosure by a non-tribal member.

The Long Company continued in possession of this ranching real estate during the two-year term of the lease. The Long Company never exercised its option to purchase. After the lease expired on December 5, 1998, the Long Company continued to hold over and occupy a portion of this real estate. The Bank subsequently moved to sell the remaining unoccupied portion of the real estate in two parcels and, in June 1999, sought to serve a Notice to Quit on the Long Company as a prerequisite to an action for forcible entry and detainer it filed in South Dakota Circuit Court.

Because off-reservation process servers cannot effectuate valid service on the CRST reservation, the Bank sent the notice to the CRST Tribal Court ("Tribal Court") asking that the Tribal Court authorize service. The Notice was then served by a tribal process server. In response, Ronnie and Lila Long commenced the underlying Tribal Court action, seeking a temporary restraining order barring the Bank from completing the sales of the remaining parcels of the real estate. The Bank denied Tribal Court jurisdiction and sought dismissal. The Tribal Court upheld jurisdiction and did not dismiss the Complaint.

The Longs then amended their Complaint, added the Long Company as a Plaintiff, and asserted several additional causes of action – including discrimination and breach of contract. The Bank answered, again denying Tribal Court jurisdiction. It then stated a Counterclaim in the alternative, "in the event the Court finds that it does have jurisdiction," seeking eviction of the Long Company from the real estate it continued to hold and damages for holding over under the lease.

The parties tried the matter before a Tribal Court jury. The jury returned a general verdict against the Bank in the amount of $750,000.00 plus interest. On post-trial motions, the Tribal Court upheld jurisdiction over the Bank, added interest to the judgment, and gave the Long Company an option to purchase the remaining held-over land owned by the Bank for a sum to be offset against the judgment against the Bank.

The Bank appealed this judgment to CRST Court of Appeals ("Tribal Court of Appeals"). The Tribal Court of Appeals affirmed the Tribal Court judgment, holding in particular that the Tribal Court had jurisdiction.

The Bank then filed suit in the United States District Court for the District of South Dakota, seeking a declaration that the Cheyenne River Sioux Tribal Court lacked subject-matter jurisdiction to adjudicate Respondents' claims against Petitioner. The United States District Court for the District of South Dakota had jurisdiction over the matter pursuant to 28 U.S.C. § 1331. The court decided the parties' cross-motions for summary judgment finding no genuine issue of material fact and that Respondents were entitled to judgment as a matter of law. Petitioner appealed to the United States Court of Appeals for the Eighth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291. The Eighth Circuit Court of Appeals affirmed the judgment of the district court.

## REASONS FOR GRANTING THE WRIT

This Court should review the judgment of the United States Court of Appeals for the Eighth Circuit because the judgment's expansion of tribal-court, civil-adjudicatory jurisdiction over nonmember defendants is inconsistent with

this Court's pathmarking jurisdictional precedents. Even assuming, for the sake of argument, that the nonmember Bank had a consensual relationship with tribal members so as to subject it to some level of tribal regulation under the first Montana exception, the tribal court lacked civil-adjudicatory jurisdiction to entertain tribal tort claims brought by tribal members against the Bank as a defendant. Such an exercise of tribal-court, civil-adjudicatory power exceeds the scope of tribal regulatory power, which extends only to what is necessary to protect tribal self-government or to control internal relations and is limited to taxation, licensing, or similar legislative controls. The scope of tribal regulatory power over nonmembers under the first Montana exception is not co-extensive with the narrower scope of civil-adjudicative power under the second Montana exception. Moreover, the land out of which the dispute arose, although within the tribal reservation, was fee land owned by the Bank.

**1. The Eighth Circuit's holding that the tribal court had jurisdiction over the Bank is irreconcilable with the governing general principle: the inherent sovereign powers of a tribe do not extend to the activities of nonmembers.**

In analyzing tribal-court jurisdiction regarding a dispute between tribal members and nonmembers, the starting point is that tribes, with their diminished status as sovereigns, have lost any "right of governing every person within their limits except themselves." Oliphant v. Suquamish Indian Tribe, 435 U.S.191, 205 (1978) (holding that Indian tribes lack criminal jurisdiction over nonmembers). This Court's decisions have adhered to the general proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Montana v. U.S., 450 U.S. 544, 565 (1981) (holding tribe had no power to regulate nonmember fishing and hunting on reservation land

owned in fee by nonmembers of the tribe). This is because the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Id. at 564.

In Montana, this Court established two exceptions to the general rule that tribes lack jurisdiction over nonmembers. First, tribes may regulate activities of nonmembers who enter consensual relationships (such as commercial dealings, contracts, or leases) with the tribe or its members through taxation, licensing, or other – presumably similar – means. Id. at 565. Second, tribes may exercise civil authority over nonmembers on fee lands within their reservations when nonmember conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Id. at 566. "The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health or welfare." Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997) (holding tribal court lacked jurisdiction over tort claims in civil action against nonmembers arising out of accident on non-fee land on reservation).

The case at bar concerns only the first Montana exception. The district court and the circuit court did not find tribal-court jurisdiction under the second Montana exception. The agreements at issue between the Bank and the Long Company, both South Dakota corporations, regarding fee land owned by the Bank on the reservation simply does not implicate tribal integrity.

As this Court noted in Hicks, under the first Montana exception, the ownership status of land is "a factor significant

enough that it 'may sometimes be . . . dispositive'" in determining whether regulation of the activities of nonmembers is necessary to protect tribal self-government or to control internal relations. Nevada v. Hicks, 533 U.S. 353, 370 (2001) (holding that tribal court did not have jurisdiction to adjudicate tort claims against nonmember state official executing process on tribal fee lands). Indeed, prior to Hicks, "with one minor exception" the absence of tribal ownership had been virtually conclusive of the absence of tribal jurisdiction (the exception being Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408 (1989), which upheld tribal authority to impose zoning regulation on fee land within the reservation owned by nonmembers). Hicks, 533 U.S. at 360. And in terms of civil-adjudicative authority, this Court has never upheld tribal-court jurisdiction regarding tort claims asserted against a nonmember defendant arising out of fee lands on the reservation owned by the nonmember. Because this is the precedent established by the circuit court's opinion in this case, and because that precedent is inconsistent with this Court's decisions in Montana, Strate, and Hicks, this Court should grant review.

Practically speaking, the Eighth Circuit's decision blurs the lines of an Indian tribe's authority to regulate, as opposed to adjudicate, nonmember activities on non-Indian fee lands on a reservation. This Court defined and limited tribal authority to regulate and adjudicate the activities of nonmembers in Montana as two narrow exceptions to the general rule that tribes lack inherent sovereign authority to regulate or adjudicate the activities of nonmembers.

But the circuit court determined that tribes may "regulate" nonmember activities falling within the first Montana "consensual relationship" exception by holding that nonmembers are subject to tribal-court jurisdiction as an "other means" of regulating nonmember conduct. As a result,

the first Montana exception now envelops the second Montana exception, which limited the scope of tribal civil authority over nonmembers to only those circumstances that threaten or directly affect the tribe's political integrity, economic security, or health and welfare – circumstances clearly not implicated by a private commercial agreement between a nonmember Bank and a South Dakota corporation owned by tribal members.

Indian tribe civil authority over nonmembers has been expanded exponentially by the Eighth Circuit's decision – a result seemingly at odds with this Court's prior decisions and the framework established by Montana and its progeny.

**2. The Eighth Circuit's Decision Erroneously Extends The First Montana Exception Thereby Subjecting Nonmember Defendants To Tribal-Court Jurisdiction In Vastly Expanded Circumstances.**

Montana established the controlling analysis courts must apply when determining the existence of tribal authority over nonmembers. As a general rule, Montana counsels that tribes lack jurisdiction over nonmembers because of their reduced sovereign status. Montana, 450 U.S. at 565 ("the inherent powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"). But recognizing that Indian tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," this Court carved out two narrow exceptions to this rule. Id.

While Montana is generally considered the "pathmarking case" establishing the confines of Indian tribe regulatory and civil authority over nonmembers, its roots sprang from Oliphant, in which this Court generally determined that tribes lack criminal jurisdiction over nonmembers. Hicks, 533 U.S. at 358. The principles relied

upon by this Court in Oliphant to limit tribal jurisdiction over nonmembers in the criminal context have been repeated and applied in the regulatory and civil authority contexts under the Montana framework.

In Hicks, this Court reiterated the teachings in Oliphant that "[w]here nonmembers are concerned, the exercise of tribal authority beyond what is necessary to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Id. at 359. Indeed, Montana acknowledges that while "Oliphant determined only inherent criminal authority in tribal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 358-59.

Here, the Eighth Circuit held that Plains Commerce Bank, a nonmember owning fee land on a reservation, subjected itself to tribal-court jurisdiction for a tribal discrimination tort claim by entering into an agreement with a member-owned South-Dakota corporation. By doing so, the circuit court created a loophole under the first Montana exception. Nonmembers like the Bank may now unknowingly be subjected to tribal claims in tribal court under the auspices of a tribes' authority to regulate consensual agreements by "other means."

The circuit court's holding necessarily permits tribal members to end-run the tribe's civil-adjudicatory authority defined and limited by the second Montana exception and the overarching principle taught by Oliphant – exercise of tribal authority over nonmembers beyond what is necessary to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. Hicks, 533 U.S. at 360.

**a. The Eighth Circuit's decision makes tribal regulatory and adjudicatory jurisdiction co-extensive under the first Montana exception and subjects nonmembers to tribal court and tribal law – an issue this Court expressly left open in Hicks.**

The fundamental problem created by the Eighth Circuit's decision is that now whenever a consensual relationship is entered into between a tribal member and nonmember, the nonmember will be generally subjected to tribal-court jurisdiction for seemingly any type of non-criminal tribal claim as long at it relates, albeit even remotely, to the consensual relationship. As a threshold issue, this Court has never held a non-Indian subject to the jurisdiction of a tribal court:

> Finally, it is worth observing that the concurrence's resolution would, for the first time, hold a non-Indian subject to the jurisdiction of a tribal court. The question (which we have avoided) whether tribal regulatory and adjudicatory jurisdiction are coextensive is simply answered by the concurrence in the affirmative. As Justice Souter's separate opinion demonstrates, it surely deserves more considered analysis.

Hicks, 533 U.S. at 374. The circuit court's decision in the present case, however, summarily decides this question in the affirmative.

Significantly, while the circuit court properly recognized that a non-member's consensual relationship in one area "does not trigger civil authority in another," having determined a consensual relationship existed between the

Bank and the Longs, it improperly relied upon the "other means" language of the first Montana exception to hold that tribal-court jurisdiction is an "other means" of regulating non-member conduct when a consensual relationship has been formed between a member and nonmember:

> We see no reason why a tribal tort cannot be applied against a nonmember in that narrow set of circumstances where the consensual relationship is otherwise completely satisfied. We therefore conclude that under Montana, the Tribe had inherent authority to regulate the bank's conduct arising out of its consensual relationship with the Longs by subjecting it to liability for tortious discrimination.

Plains Commerce Bank, 491 F.3d at 887-88.

If the circuit court's expansive definition of "other means" is accepted, so as to permit tribal-court adjudication of claims between members and nonmembers anytime a consensual relationship is determined to exist between a tribal member and nonmember, the first Montana exception necessarily engulfs the second exception and dramatically shrinks the general rule that nonmembers are not subject to tribal jurisdiction.

**b. The circuit court's analysis renders the second Montana exception purposeless.**

The Eighth Circuit's holding rests upon an over-expansive interpretation of the language "other means" set forth in the first Montana exception. By determining tribal-court adjudicatory authority to be an "other means" of regulating the conduct of nonmembers under the first Montana exception, the circuit court's decision renders the second exception, which limited a tribe's "civil authority"

over nonmembers to matters implicating only the political integrity and internal relations of a tribe, unnecessary.

As discussed above, the first Montana exception contemplates a tribe's authority to regulate nonmembers while the second exception contemplates a tribe's inherent power to exercise civil authority over nonmembers. Montana, 450 U.S. at 565-66. In Hicks and Strate this Court made clear that "[a]s to nonmembers, a tribal court's inherent adjudicatory authority is at most as broad as the tribe's regulatory authority." Hicks, 533 U.S. at 353, citing Strate, 520 U.S. at 453. But this Court has never held that "tribal regulatory and adjudicatory jurisdiction are coextensive." Hicks, 533 U.S. at 374. Yet that is precisely what the circuit court has implicitly held here.

At issue is a private commercial agreement that existed between a nonmember Bank owning fee land on a reservation, and a member-owned South Dakota Corporation. The second Montana exception is patently inapplicable here, as in Hicks, because "[s]elf-government and internal relations are not directly at issue here, since the issue is whether the Tribes' law will apply, not only to their own members, but to a narrow category of outsiders." Hicks, 533 U.S. at 371.

The tribe's authority to regulate the nonmember Bank under the first Montana exception is, at most, no broader than the scope of authority under the second "civil authority" exception. See Hicks, 533 U.S. at 367. Because the tribe lacked civil authority over Plains Commerce Bank under the second Montana exception, the tribe necessarily lacked authority to adjudicate tribal tort discrimination claims against Plains Commerce Bank under the first Montana exception as an "other means" of regulating the Bank's conduct. See id. at 374 ("Finally, it is worth observing that the concurrence's resolution would, for the first time, hold a

non-Indian subject to the jurisdiction of a tribal court. The question (which we have avoided) whether tribal regulatory and adjudicatory jurisdiction are coextensive is simply answered by the concurrence in the affirmative. As Justice Souter's separate opinion demonstrates, it surely deserves more considered analysis").

If upheld, the circuit court's decision would have the anomalous effect of rendering the tribal civil-authority limitation espoused in the second Montana exception meaningless. Tribal members would be free to pursue tribal claims against nonmembers under the auspices of an "other means" of regulating nonmember conduct under the first Montana exception – exactly what has happened here. Surely the Court did not have this in mind when it created the two narrow Montana exceptions differentiating the scope of a tribe's regulatory and civil authority over nonmembers.

### 3. The Eighth Circuit's Decision Extends Tribal Jurisdiction Over Nonmembers To Non-Indian Owned Fee Lands – A Result Inconsistent With This Court's Prior Decisions.

As a result of the circuit court's decision, non-Indians owning fee land on a reservation may now generally be subject to tribal civil and regulatory authority – a result repeatedly proscribed by this Court.

"Both Montana and Strate rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not assert a landowner's right to occupy and exclude." Hicks, 533 U.S. at 359. And while the "general rule of Montana applies to both Indian and non-Indian owned land ... [and] ownership status of land ... is only one factor to consider in determining whether regulation of the activities of nonmembers is necessary to protect tribal self-government or

to control internal relations ... [it] may sometimes be a dispositive factor. Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction with one minor exception we have never upheld under Montana the extension of tribal civil authority over nonmembers on non-Indian land." Id. at 360.

Here, the land at issue is non-Indian fee land on a reservation. Even if the Eighth Circuit properly determined that Long Company, a member-owned South Dakota corporation was, in effect, a "tribal member," and that the nonmember Bank entered into a consensual or commercial relationship with it, neither the first nor second Montana exceptions apply because the land at issue is not Indian-owned. Stated differently, because the tribe lacked authority to exclude or occupy the non-Indian fee land at issue, it lacked the authority to regulate it as well, which also precludes it from regulating the activities of nonmembers concerning the land by any "other means" – including subjecting the Bank to tribal court and tribal law.

## CONCLUSION

The Eighth Circuit Court of Appeals' opinion in this case greatly expands the scope of tribal-court jurisdiction available under the first Montana exception. This expansion cannot be reconciled with this Court's decisions interpreting that exception. The Bank, as a tribal nonmember owning non-Indian fee land within a reservation, was subjected to tribal tort claims in tribal court as an "other means" of regulating the conduct of nonmembers who enter a consensual relationship with a member-owned, South Dakota corporation. The balance struck by the two narrow exceptions carving out tribal regulatory and adjudicatory authority over nonmembers set forth in Montana and its progeny has been undone. As a result of the circuit court's decision, a tribe's

authority to regulate the conduct of nonmembers has been made co-extensive with its civil authority to adjudicate claims against nonmembers – an issue this Court has, to date, left unanswered.

Whether a tribal court has jurisdiction over nonmembers, and, if so, to what extent, are questions this Court must decide, as any answer will have far-reaching impact. Accordingly, Plains Commerce Bank respectfully requests that this Court grant its petition for certiorari.

Respectfully submitted,

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Dated: September 21, 2007

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United States Court of Appeals
for the Eighth Circuit

No. 06-3093

Plains Commerce Bank,
Plaintiff/Appellant, Appeal from the United States District Court for the District of South Dakota.

v.

Long Family Land and Cattle Company, Inc.; Ronnie Long; Lila Long,
Defendants/Appellees.

Cheyenne River Sioux Tribe,
Amicus Curiae - Amicus on Behalf of Appellee.

Submitted: March 12, 2007
Filed: June 26, 2007

Before WOLLMAN, JOHN R. GIBSON, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

The Plains Commerce Bank (bank) brought this declaratory judgment action in the federal district court against Ronnie and Lila Long and the Long Family Land and Cattle Company, Inc. (Long Company), seeking to have a tribal judgment of the Cheyenne River Sioux Tribal Court of Appeals declared null and void. That judgment upheld a jury verdict in the Longs' favor on their claim that the bank had discriminated against them as Indians and tribal members. The bank now argues that the tribal courts lacked jurisdiction over the Longs' discrimination claim and that it was denied



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due process by the tribal proceedings. The district court[1] granted summary judgment to the Longs, and we affirm.

I.

The Long Company is a family farming and ranching business incorporated under the laws of South Dakota and located on the Cheyenne River Sioux Indian Reservation. Under its articles of incorporation, at least 51% of the company's outstanding shares must be Indian owned at all times, ensuring the company's eligibility for Bureau of Indian Affairs (BIA) loan guarantees. See 25 C.F.R. § 103.7 (2000); see also id. § 103.25(b) (2006). Husband and wife Ronnie and Lila Long, who are both enrolled members of the Cheyenne River Sioux Tribe (Tribe), own at least 51% of the company's shares. Ronnie Long's father, Kenneth Long, who was not a tribal member, owned the remaining 49% of the company's shares until his death in 1995. The parties disagree about whether his shares were distributed to Ronnie Long,[2] but it is undisputed that the Longs have majority ownership of the company.

The bank is a South Dakota corporation with its principal place of business outside the reservation. The bank had been lending to the Long Company for many years, and

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[1] The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota.

[2] In his will Kenneth purported to devise his interest in the company and his land on the reservation to his four children. Since Ronnie Long's siblings assigned their interest to him, the Longs claim 100% ownership of the Long Company. The bank disputes this, noting that it has filed a creditor's claim against the estate and asserting that Kenneth's interest in the company was never distributed by the probate court. The estate was still in probate at the time of the district court judgement.

these loans were guaranteed by the BIA because of the Long Company's Indian owned status. Kenneth, Lila, Ronnie, and Ronnie's mother Maxine, an enrolled tribal member, also personally guaranteed loans extended to the company. Prior to their deaths, Kenneth and Maxine Long mortgaged to the bank some 2,230 acres of fee land inside the reservation in order to secure loans for the Long Company operation. At the time of his death, Kenneth and the Long Company owed the bank $750,000.

In the spring of 1996 a bank officer came onto the reservation to inspect the Longs' land, cattle, hay, and machinery. Thereafter, the bank and the Longs entered into negotiations for a new loan agreement, and tribal officers and BIA employees helped to facilitate the negotiating sessions which took place in the Tribe's offices. The final agreement, which was signed at the bank's offices, provided that the mortgaged land would be deeded over to the bank in consideration for canceling some debt and making additional loans to the Long Company for use in its ranching operations. The Long Company was given a two year lease on the property with an option to purchase.

According to the Longs, the bank initially offered them more favorable terms, proposing to sell the mortgaged land back to them with a twenty year contract for deed. The bank later sent a letter to Ronnie Long withdrawing that offer, however, citing "possible jurisdictional problems" posed by the Long Company's status as an "Indian owned entity on the reservation." The Longs also claim that the bank never provided the promised operating loans to the Long Company and as a result the company was not able sustain its ranching operation through the particularly harsh winter of 1996-97.

Because the Longs lost hundreds of livestock that winter, they were unable to exercise their option to repurchase their land, which required full payment for the land within

sixty days of the expiration of their two year lease. When they did not vacate the property after their lease expired in late 1998, the bank initiated state eviction proceedings against them. The bank also asked the Cheyenne River Sioux Tribal Court to serve the Longs with a notice to quit, but by this time the bank had already sold 320 acres of the land to Ralph and Norma Pesicka. In June of 1999, while the Longs continued to occupy a 960 acre parcel of the land, the bank sold the remaining 1,910 acres to Edward and Mary Maciejewski under a ten year contract for deed with a lower interest rate than that offered to the Long Company under its lease with option to purchase. Neither the Pesickas nor the Maciejewskis are tribal members.

The Longs filed a complaint in tribal court alleging that the bank had impermissibly engaged in self help measures when it sold the land while the Longs were still in possession. The Longs moved for a restraining order to prevent the bank from going through with the sales, and the bank moved to dismiss for lack of subject matter jurisdiction. The tribal court denied both motions. The Longs then amended their complaint to add their company as a plaintiff and to include a number of additional causes of action against the bank, including breach of contract, bad faith, and lack of consideration.

The Longs also brought a discrimination claim, seeking to have the land sales set aside on the ground that the sale to nonmembers "on terms more favorable" than the bank had extended to the Longs evidenced "unequal treatment and unfair discrimination against the Longs . . . ." The claim did not allege any statutory violation. The Longs introduced as evidence the bank's letter explaining its reluctance to sell the land to the Long Company on account of its status as an Indian owned entity. The bank filed a counterclaim in the tribal court for wrongful holdover of possession of the land,

seeking damages and the Longs' eviction. While the Longs requested that their claims be tried to a jury, the bank did not.

In a motion for summary judgment on its counterclaim, the bank conceded that the tribal court had jurisdiction over the subject matter because enrolled tribal members held majority ownership of the Long Company. Shortly before the jury was charged, the bank changed its position. At that point the bank asserted in a short colloquy with the tribal court that jurisdiction was lacking over the Longs' discrimination claim, alleging that the claim arose under federal law and could therefore not be heard in tribal court under Nevada v. Hicks, 533 U.S. 353 (2001). The trial judge rejected this argument and stated, "I think we have authority to enforce federal laws." At no time did the Longs state that their claim arose under federal law. The bank did not challenge tribal jurisdiction over the Longs' other claims.

A seven member jury was instructed on four of the Longs' claims: breach of contract, bad faith, discrimination, and improper use of self help remedies. The bank had the opportunity to request that nonmembers or non Indians be summoned to serve on the jury, but it made no such request. On the Longs' discrimination claim the judge instructed the jury: "A person or entity engages in discrimination under these instructions when that person or entity intentionally denies a privilege to a person based solely upon that person's race or tribal identity."[3] No reference was made to any statute or to federal law. A unanimous jury found for the Longs on all counts except the self help claim and returned a general verdict in their favor for $750,000 in damages plus interest. In addition, the trial court awarded the Longs the option to

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[3] The jury verdict form similarly read: "Did the Defendant Bank intentionally discriminate against the Plaintiffs Ronnie and Lila Long based solely on their status as Indians or tribal members in the lease with option to purchase?"

purchase the 960 acres of land which they continued to occupy. The court also dismissed the bank's counterclaim in light of the jury verdict and tribal law.

The bank filed a post trial motion challenging tribal jurisdiction over the Longs' discrimination claim, contending that the claim "would fall under 42 U.S.C. § 1981" and therefore could only be adjudicated in federal or state court. The bank did not challenge tribal jurisdiction over the Longs' other claims, however. The trial court denied the motion. In discussing the basis for the discrimination claim, the court stated that the Tribe "does not appear to have specific code provisions prohibiting private discrimination and the Court is therefore instructed to look to relevant federal law." In the course of upholding the judgment the trial court referenced 42 U.S.C. § 2000d, a federal statute prohibiting racial discrimination in the distribution of benefits from a federally assisted program.

The bank appealed the judgment to the tribal court of appeals which affirmed tribal jurisdiction. The appellate court concluded that although the tribal court might lack authority to adjudicate federal causes of action, the Longs' claim for discrimination did not arise under federal law even if the trial judge believed that it contained some "federal ingredients." Instead, the claim arose under the traditional common law of the Tribe. Relying in part on an amicus brief submitted by the Tribe, the court of appeals concluded that under traditional Lakota notions of justice, fair play, and decency to others, discrimination because of race or tribal affiliation was tortious conduct. It noted that the tribal code gives the tribal courts jurisdiction over tort claims like that of the Longs. It also concluded that Supreme Court precedent permitted the exercise of such jurisdiction over a non Indian bank because the bank had formed a consensual relationship with members of the Tribe and because the bank's conduct implicated the

Tribe's economic security.

The bank subsequently filed this action in federal district court seeking a declaration that the tribal judgment was null and void and not entitled to recognition because the tribal court lacked jurisdiction over the Longs' discrimination claim and because the proceedings violated due process. The bank alleged that by upholding the jury verdict on the discrimination claim on the basis of tribal law when the trial judge believed the claim to be founded on federal law, the tribal court of appeals had deprived it of notice and a fair opportunity to defend against the claim.

Both parties moved for summary judgment, and the district court granted it to the Longs. The court concluded that the tribal courts had jurisdiction under one of the categories of permissible tribal jurisdiction over nonmembers which were recognized in Montana v. United States, 450 U.S. 544 (1981), because the bank had entered into a consensual relationship with the Longs and their company. The court emphasized that the Longs' claim arose directly out of their relationship with the bank and noted that the bank had conceded tribal jurisdiction at an earlier point in the tribal proceedings. The district court found no due process violation, noting that appellate courts may affirm on any ground supported by the record and that the bank had had a full opportunity to develop the record on the issue of discrimination.

The bank appeals from the grant of summary judgment. It argues that the district court erred in concluding that the tribal court had jurisdiction under the Montana exception for consensual relationships between members and nonmembers. It contends that it formed a business relationship only with the Long Company, a South Dakota corporation with no racial or tribal identity. The bank also argues that the Longs' discrimination claim was federal in nature and that tribal courts may not entertain federal causes

of action even if one of the Montana exceptions is met. Although the bank alleged in the district court that the Longs' claim arose under 42 U.S.C. § 1981, it contends on appeal that it was manifestly a § 2000d action. Finally, the bank argues that the tribal judgment is not entitled to comity in federal court because the proceedings denied it fundamental due process. It claims that by invoking tribal common law to uphold the discrimination claim, the tribal court of appeals employed a new theory of recovery and thereby deprived the bank of a fair opportunity to defend itself. Both the Longs and the Tribe as their amicus urge us to adopt the reasoning of the district court and affirm its judgment.

II.

We review a grant of summary judgment de novo, applying the same standard as the district court. Passions Video, Inc. v. Nixon, 458 F.3d 837, 840 (8th Cir. 2006). Summary judgment is appropriate where there is no genuine material issue of fact and the moving party is entitled to judgment as a matter of law. Id.; see also Fed. R. Civ. P. 56(c). Whether a tribal court properly exercised jurisdiction over a claim is an issue of federal law reviewed de novo. Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994); see also Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852-53 (1985) (claim arises under 28 U.S.C. § 1331).

In recognition of the status of Indian tribes as distinct cultural and political communities, see Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978), the federal government has long encouraged tribal self government, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987). Although the tribes no longer possess the "full attributes of sovereignty," United States v. Kagama, 118 U.S. 375, 381 (1886), they nevertheless retain those internal powers necessary to their self government which have not been withdrawn by the

federal government. See United States v. Wheeler, 435 U.S. 313, 323 (1978).

Because the authority of the tribes is founded on their "right . . . to make their own laws and be ruled by them," tribal jurisdiction does not normally extend to the conduct of nonmembers unless Congress has expressly granted such authority. See Strate v. A-1 Contractors., 520 U.S. 438,446, 459 (1997), quoting Williams v. Lee, 358 U.S. 217, 220 (1959). In the watershed case of Montana v. United States,, the Supreme Court identified two exceptions to this general principle. 450 U.S. 544 (1981).

Under Montana, tribes may exercise jurisdiction over nonmembers if they have entered into certain kinds of consensual relationships or if they have engaged in conduct on tribal lands which would harm tribal interests:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66 (citations omitted).

The unifying principle behind both exceptions is that absent express congressional delegation, a tribe has civil authority[4] over non Indians only where such authority is

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[4] Tribes are unable to exercise criminal jurisdiction over non Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191

"necessary to protect tribal self-government or to control internal relations." Id. at 564. Although Montana specifically addressed the regulatory rather than adjudicatory jurisdiction of tribes, see id. at 557, there is nevertheless a presumption that if a tribe has authority under Montana to regulate the activities of a nonmember, jurisdiction over disputes arising out of those activities exists in the tribal courts. Strate, 520 U.S. at 453.

The Longs argue, and the district court concluded, that the Tribe's exercise of jurisdiction over the bank falls within its inherent authority under the first Montana exception.[5] Consideration of this basis for tribal jurisdiction involves two separate questions: whether the bank formed a consensual relationship with the Tribe or its members and whether the tribal tort law invoked by the Longs is an appropriate "other means" by which a tribe may regulate nonmember conduct.

The bank argues that it never formed a consensual relationship with any tribal member because it provided loans to the Long Company, a South Dakota corporation. It contends that a corporation does not take on the tribal identity of its owners, pointing to the general principle that a corporation and its shareholders are distinct entities, see, e.g., Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003), and arguing that there is no justification here to pierce the corporate veil separating the Longs and their company. The Longs respond that the bank should not be heard to challenge the tribal character of their company when for many years the bank took advantage of financial incentives available to it only because the Long Company was Indian owned. They

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(1978).

[5] Neither party suggests that any treaty or federal statute has directly enlarged or contracted the inherent tribal authority under discussion.

also argue that the bank formed relationships with them as individual tribal members.

We agree that the bank's argument ignores the broader context of its interaction with the Long Company and with the Longs themselves. The Long Company, which was formed to take advantage of BIA incentives for developing Indian enterprises located on the reservation, was overwhelmingly tribal in character, as were its interactions with the bank. See Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1134-35 (9th Cir. 2006) (en banc) (nonprofit corporation that was designated a tribal corporation in its charter and that operated inside the reservation can be treated as a tribal member under Montana). The bank directly benefited from the Long Company's status as an Indian owned business entity, see 25 C.F.R. § 103.7 (2000) (requiring at least 51% Indian ownership), which qualified the company for BIA guaranteed loans and allowed the bank to greatly reduce its lending risk, see id. § 103.2 (2006). The bank could not have been unaware that it might be subject to tribal jurisdiction since in its letter to Ronnie Long withdrawing its offer to sell the land back to the Longs, the bank alluded to the "jurisdictional" implications of the Long Company's Indian ownership.

Moreover, the bank's loans to the Long Company were not simple corporate transactions. The bank repeatedly interacted with Lila, Ronnie, and Maxine Long. All three tribal members personally guaranteed the debt of the Long Company. The bank also sought the assistance of the Tribe in renegotiating a loan agreement with the Longs and their company, as well as in serving the Longs with notice to quit after they were unable to exercise their option to purchase.[6]

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[6] By this point the bank had another quite basic tie to the reservation since it had become the owner of the Long's former land on the reservation.

Because the bank not only transacted with a corporation of conspicuous tribal character, but also formed concrete commercial relationships with the Indian owners of that corporation, we conclude that it engaged in the kind of consensual relationship contemplated by Montana. At its heart the Montana inquiry is about tribal interests and tribal self government. See generally Hicks, 533 U.S. 353. The Tribe's interest in regulating commercial transactions between its members and nonmembers does not disappear just because a corporation is also a party to those transactions. That the Tribe was actively involved in facilitating negotiations between the Longs and the bank confirms that the Tribe had its own interest in facilitating the commercial endeavors of its members and in ensuring that they are not unfairly dispossessed of reservation land.

The existence of a consensual relationship is not alone sufficient to support tribal jurisdiction. See Strate, 520 U.S. at 457. The tribal exercise of authority must also take the form of taxation, licensing, or "other means" of regulating the activities of the nonmember, Montana, 450 U.S. at 565, and this regulation must have some nexus to the consensual relationship. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001). In other words, a nonmember's consensual relationship in one area "does not trigger tribal civil authority in another." Id.

The Supreme Court applied this limiting principle in the context of tort law in Strate v. A-1 Contractors, 520 U.S. 438 (1997). In Strate, a nonmember brought a lawsuit in tribal court against another nonmember for injuries sustained in an accident on a state highway within an Indian reservation. Although the defendant in that action had a consensual relationship with the Three Affiliated Tribes as a result of his work as a subcontractor for them, the lawsuit had not arisen within the context of that relationship. Rather, it arose out of a

purely accidental encounter between two strangers. Because the tort was "distinctly non-tribal in nature," id. at 457, the tribes' interest in regulating the conduct was correspondingly attenuated, see id. at 459. Notably, the Court did not hold that tort law could never be an appropriate means for tribes to regulate nonmember conduct, but rather that there was no connection between the personal injury claim and the defendant's consensual relationship with tribal entities. See id. at 457.

In contrast, the Longs' discrimination claim arose directly from their preexisting commercial relationship with the bank. While the personal injury tort at issue in Strate defined the duties of one stranger to another, the tribal tort in this case provided a standard of conduct to govern the bank's preexisting relationship with the Longs. Moreover, the legal obligation to refrain from discriminating on the basis of tribal affiliation is decidedly more "tribal" than the basic personal injury law applicable in Strate. Unlike Strate, this case is not about a tribe's power to govern nonmembers "just because they enter the tribe's territory." See A-1 Contractors v. Strate, 76 F.3d 930, 941 (8th Cir. 1996) (characterizing central issue), aff'd, 520 U.S. 438. Rather, this case is about the power of the Tribe to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members.

In this respect we find the present situation more closely akin to the regulation upheld in Buster v. Wright, 135 F. 947 (8th Cir. 1905), a case cited by the Court in Montana as an illustration of the consensual relationship exception. See 450 U.S. at 566; see also Strate, 520 U.S. at 457. In Buster, this court upheld a permit tax on nonmembers for the privilege of conducting business with members on the reservation. After likening the permit tax to a license, we concluded that the regulation was permissible because the tribe had inherent authority to "prescribe the terms upon

which noncitizens may transact business within its borders." 135 F. at 950.

Here, the Tribe was doing just that and exercising its inherent authority. By subjecting the bank to liability for violating tribal antidiscrimination law in the course of its business dealings with the Longs, the Tribe was setting limits on how nonmembers may engage in commercial transactions with members inside the reservation. The fact that we are dealing with the common law of torts rather than a licensing requirement or other statutory provision makes no substantive difference here. Tort law is after all both a means of regulating conduct, see, e.g., W. Page Keeton, et al., Prosser and Keeton on Torts 25 (5th ed. 1984) (Prosser), and an important aspect of tribal governance. See Smith 434 F.3d at 1140. As the Supreme Court indicated in Curtis v. Loether, 415 U.S. 189 (1974), the distinction between statutory and common law rights may be functionally irrelevant in the context of intentional discrimination. Id. at 195 (discrimination claim for damages under the Civil Rights Act sounds in tort for purpose of Seventh Amendment). We see no reason why a tribal tort cannot be applied against a nonmember in that narrow set of circumstances where the consensual relationship exception is otherwise completely satisfied.

We therefore conclude that under Montana, the Tribe had inherent authority to regulate the bank's conduct arising out of its consensual relationship with the Longs by subjecting it to liability for tortious discrimination.[7]

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[7] Because we conclude that the case falls within the first Montana exception, we need not address the Longs' additional argument that tribal jurisdiction would also be appropriate under the second exception (on the ground that the bank's conduct "threatens or has some direct effect on the political

The bank argues that the Montana test is not dispositive of jurisdiction in this case because even if the tribal courts *would have had* authority under Montana to adjudicate a tribal law claim against it, they did not actually hear such a case. It contends that the Longs' discrimination claim is more properly characterized as a federal claim under 42 U.S.C. § 2000d. The bank also contends that the Supreme Court's decision in Hicks, 533 U.S. 353, precludes the tribal courts from exercising jurisdiction over a federal claim even if it falls within one of the Montana exceptions. The Longs respond that Hicks is not implicated here because their claim arose under tribal rather than federal law. They also add that even if they had raised a federal claim, the holding in Hicks was sufficiently narrow that it would not bar jurisdiction in this case.

In Hicks, the Supreme Court held that tribal courts had no jurisdiction to hear a § 1983 claim brought by a tribal member against state officers who had entered onto tribal land to execute a search warrant. Id. at 374. The bank argues that Hicks implicitly foreclosed tribal jurisdiction over other federal claims as well, including the Longs' claim which it now characterizes as arising under § 2000d. In contrast to the present case, however, the exercise of jurisdiction in Hicks did not fall within either Montana exception. Id. at 359 n.3, 364. The Supreme Court has never addressed whether tribal courts would be barred from hearing federal claims even when they would otherwise have jurisdiction under Montana, and we need not address this open question in this case.

We conclude that the tribal court of appeals appropriately upheld jurisdiction on the basis of tribal rather than federal law. Although the tribal trial court offered a post

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integrity, the economic security, or the health or welfare of the tribe"). 450 U.S. at 566.

hoc federal basis for upholding the jury's verdict on the Longs' discrimination claim and even asserted it had authority to enforce federal law against nonmembers, a mistaken jurisdictional analysis in the trial court cannot override the Longs' pleadings and the decision of the tribal court of appeals. Moreover, even though the tribal court looked to federal law for guidance in upholding the verdict,[8] this would not necessarily mean that it regarded the cause of action as arising under federal law. Tribal law often draws upon an array of sources, from customary law to treaties, and the Cheyenne River Sioux are "free to borrow from the law of other tribes, states, and the federal government." F. Cohen, Handbook of Federal Indian Law 274 (2005).

The existence of subject matter jurisdiction has traditionally depended on how a claim was pled, not on how the claim was perceived by the trial court. See, e.g., The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("[T]he party who brings a suit is master to decide what law he will rely upon."); Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) (as "master of the claim," plaintiff may "avoid federal jurisdiction by exclusive reliance on state law"). There is no indication that the Longs pled a federal cause of action, and the fact that the Longs *could have* pled a federal action is immaterial. The Longs' complaint alleged that the bank had engaged in "unequal treatment and unfair discrimination" when it granted more favorable terms to non Indian purchasers than to the Longs, making no mention of federal law or the elements of a particular federal claim. Cf. Wardle v. Nw. Inv. Co., 830 F.2d 118, 121-122 (8th Cir. 1987) (failure to allege specific elements of Little Tucker Act claim "strongly suggests" that no such claim was pled).

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[8] The trial court noted that the "Cheyenne River Sioux Tribal Code directs this Court to apply federal law in the absence of applicable tribal law."

The bank's argument places undue emphasis on the trial court's jurisdictional analysis and gives too little regard to the decision of the tribal court of appeals. The Supreme Court has made it clear that until tribal appellate courts have had the "opportunity to review the determinations of the lower tribal courts" and to "rectify any errors," tribal evaluation of its own jurisdiction is not complete. Iowa Mut., 480 U.S. at 16-17, quoting Nat'l Farmers, 471 U.S. at 857 (1985).

Under the exhaustion doctrine first enunciated in National Farmers, 471 U.S. 845, federal courts will not review a tribe's jurisdiction until the tribal appellate review is complete. Iowa Mut., 480 U.S. at 17. The exhaustion requirement gives tribal courts the opportunity "to explain to the parties the precise basis for accepting jurisdiction" and to "provide other courts with the benefit of their expertise in such matters in the event of further judicial review." Nat'l Farmers, 471 U.S. at 857. Exhaustion would be a meaningless exercise if federal courts were to ignore the determinations of the tribal appellate court. Here, the tribal court of appeals corrected the trial court's erroneous assumption that because the tribal code itself did not create a cause of action for discrimination, the only source of jurisdiction would be its authority to adjudicate federal law. "Proper respect for tribal legal institutions," Iowa Mut., 480 U.S. at 16, requires that we not overlook the appellate court's analysis as the bank would have us do. Since the tribal court of appeals upheld jurisdiction over a tribal rather than federal law claim and since the Longs' claim was not pled as a federal cause of action, we need not consider whether the tribal court would have had jurisdiction over a federal civil rights claim.

We conclude that the Montana inquiry is dispositive of tribal court jurisdiction over the Longs' tribal law discrimination claim. See Hicks, 533 U.S. at 358 n.2 (limiting

holding to its facts). The Tribe had inherent authority to regulate the bank's activities in connection with its consensual business relationship with the Longs and their company. As a natural corollary, the tribal court system – the institution "best qualified to interpret and apply tribal law," Iowa Mut., 480 U.S. at 16 – also had jurisdiction to entertain tribal law disputes arising out of those activities.[9] See Strate, 520 U.S. at 453 (discussing presumption of coextensive adjudicative jurisdiction); see also Martinez, 436 U.S. at 65 (recognizing tribal courts as appropriate fora for adjudicating disputes involving interests of both Indians and non Indians). The tribal court therefore properly exercised jurisdiction over the Longs' discrimination claim.

III.

The bank next argues that the tribal judgment is not entitled to recognition because it was obtained in violation of due process. It objects to the decision by the tribal court of appeals to uphold the jury's discrimination verdict on the basis of tribal tort law, arguing that the appellate court should have been constrained to address it under the federal law mentioned by the trial judge. The bank contends that it did not have proper notice that it was facing a tribal rather than a federal claim for discrimination and therefore was denied an adequate opportunity to defend itself against the claim. Finally, the bank suggests that it should not have been subject to liability for a tort that had not previously been recognized.

The Longs respond that the bank had adequate notice

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[9] Any distinction between regulatory and adjudicative jurisdiction would be artificial here, since the tribal courts acted in both a regulatory and adjudicatory capacity when they determined the respective rights and duties of the parties. See Strate, 76 F.3d at 938.

because their complaint was pled as a tribal law claim, the same basis upon which it was ultimately upheld. The Longs also point out that appellate courts may and often do affirm judgments on alternate grounds so long as doing so does not cause unfairness to the litigants. There was no unfairness here they say, because the bank had a full opportunity to develop the record on all elements of the tort and these elements did not materially differ from those included in the jury instructions or verdict form. The Tribe as amicus also urges this court not to second guess the authority or competency of its court system to articulate the evolving principles of tribal common law.

As an initial matter we note that the bank's due process claim is quite distinct from a traditional due process challenge. That is because the Bill of Rights and the Fourteenth Amendment do not of their own force constrain the authority of tribes or tribal courts.[10] See Martinez, 436 U.S. at 56. Tribes are obliged to comply with the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1303, which contains analogous due process protections. The bank did not raise a claim under the ICRA, and even if it had, that statute created no private cause of action for declaratory relief in federal court. See Martinez, 436 U.S. at 72.

The bank maintains, however, that under principles of comity a tribal judgment should not be recognized in federal court if the tribal proceedings violated due process of law. Comity refers to the recognition that one court affords to the

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[10] We have jurisdiction over the bank's due process claim whether or not it arises under 28 U.S.C. § 1331 because it is part of the same case or controversy, see 28 U.S.C. § 1367(a), as the bank's challenge to tribal jurisdiction which arises under federal law. See Nat'l Farmers, 471 U.S. at 852-53; see also Alternate Fuels, Inc. v. Cabanas, 435 F.3d 855, 857 n.2 (8th Cir. 2006).

decision of another "not as a matter of obligation, but out of deference and respect." Black's Law Dictionary 242 (5th ed. 1979). For support the bank cites the Ninth Circuit decision in Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), which concluded that a federal court should recognize tribal judgments under principles of comity similar to those which govern recognition of foreign judgments. Id. at 810; see also, e.g., Burrell v. Armijo, 456 F.3d 1159 (10th Cir. 2006); Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985). Using an analogy to Hilton v. Guyot, 159 U.S. 113 (1895), the leading case on federal recognition of foreign judgments, the Ninth Circuit concluded that a tribal court judgment should not be recognized if it was obtained in violation of basic due process rights. Marchington, 127 F.3d at 810. It reasoned that in the context of comity, due process requires that a defendant be given the opportunity for a "full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws." Id. at 811.

This court has not had occasion to consider whether to borrow principles for recognition of foreign judgments in considering recognition of tribal judgments, and we need not do so in this case. Since we conclude on the basis of this record that the tribal proceedings violated no basic tenet of due process, we need not discuss the test articulated in Marchington.

As the Longs point out, it is not uncommon for this court to uphold a judgment on grounds not decided or discussed in the district court so long as those grounds are supported by the record. See, e.g., United States v. Sager, 743 F.2d 1261, 1263 n.4 (8th Cir. 1984). A tribe is neither required nor expected to use the same judicial procedures employed by federal courts, however, and federal courts must

take care not to exercise "unnecessary judicial paternalism in derogation of tribal self-governance." Marchington, 127 F.3d at 811; see also Kremer v. Chem. Constr. Corp., 456 U.S. 461, 483 (1982) (due process dictates "no single model of procedural fairness, let alone a particular form of procedure"). The rules that this circuit has developed for departing from the reasoning of a lower court reflect our own balancing of considerations like judicial economy and the interests of both parties. Cf. Singleton v. Wulff, 428 U.S. 106, 121 (1976) (decision is primarily matter of discretion for appellate court). The tribal court of appeals is free to strike a different balance between those considerations so long as its procedures do not deny defendants adequate notice and fair opportunity to defend themselves. See Hilton, 159 U.S. at 167, 205.

In this case there was no deficiency in notice or opportunity to defend sufficient to make out a due process violation. The Longs never asserted a violation of federal law, the bank made no attempt to dismiss the discrimination claim for vagueness, and no reference to federal law was made to the jury.[11] The bank has also not shown that it suffered prejudice as a result of having tailored its defense to a federal rather than tribal claim. The fighting issue in the trial court was whether the bank denied the Longs favorable terms on a deal solely on the basis of their race or tribal affiliation. The bank had ample opportunity to present evidence that it did not give the Longs less favorable terms than its non Indian customers or that it did so for some other permissible reason. We discern no difference between the tribal tort of

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[11] If the bank was convinced that it was defending against a federal claim over which the tribal court had no jurisdiction, it could have gone immediately to federal court to seek a declaratory judgment that the tribal courts lacked authority to hear the case. See Hicks, 533 U.S. at 369, 374 (holding exhaustion requirement inapplicable where jurisdiction clearly lacking).

discrimination as recognized by the tribal court of appeals and the claim as it was presented to the jury. The bank was therefore not denied a fair opportunity to present relevant evidence or to defend itself.

The bank also argues that it should not have been subject to liability under a tort that had not previously been recognized by the tribal court of appeals. That the Longs' discrimination claim was novel is not itself grounds for refusing comity to the subsequent judgment where there is no indication that the court otherwise acted out of bias or refused to follow its own law. See Prosser, supra, at 4(novelty of claim not itself a bar to recovery). Tort law has historically developed incrementally in the courts. See id. at 3 ("[T]he progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before."). If the encouragement of tribal self governance through the development of legal institutions is to remain a federal priority, see, e.g., Iowa Mut., 480 U.S. at 16-17, then tribal appellate courts must be given latitude to shape their own common law to respond to the cases before them, as our own courts have done over the centuries.

The bank has also suggested that as a non Indian company it could not obtain a fair hearing in tribal court on a claim that it discriminated against Indians, but there is simply no evidence to support this assertion. If the bank feared prejudice from an all Indian jury, it could have requested that the tribal court exercise the discretion granted to it by the tribal code to summon non Indians to serve on the jury. It made no such request, but instead proceeded to trial without striking any jurors or challenging the composition of the panel. Absent some indication that the tribal courts were biased or subject to political control, we must presume the court system to be competent and impartial. Duncan Energy,

27 F.3d at 1301. The bank has failed to show any bias in this case.

Since the bank has failed to show that it was denied a full and fair opportunity to be heard in tribal court, we see no reason on this record to deny comity to the Longs' tribal judgment.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

PLAINS COMMERCE BANK, Plaintiff, CIV 05-3002 **2006 DSD II**

-vs-

MEMORANDUM OPINION AND ORDER

LONG FAMILY LAND AND CATTLE COMPANY, INC., and RONNIE and LILA LONG,

Defendants.

**KORNMANN, U.S. DISTRICT JUDGE**

[¶1] Plains Commerce Bank ("bank") filed this action under 28 U.S.C. § 2201 seeking declaratory relief against the Long Family Land and Cattle Company, Inc. ("Long Company") and Ronnie and Lila Long. On December 1, 2005, cross motions for summary judgment were filed by the bank (Doc. 28) and the defendants (Doc. 33).

## BACKGROUND

[¶2] The bank, formerly known as Bank of Hoven, is a South Dakota banking corporation with its principal place of business located in Potter County, South Dakota. The Long Company is a South Dakota chartered family farm corporation with its principal place of business in Dewey County, South Dakota, on the Cheyenne River Sioux Tribe ("CRST") Indian Reservation. Ronnie Long ("Ronnie") is the son of Kenneth ("Kenneth") and the late Maxine ("Maxine") Long. Ronnie's wife is Lila ("Lila") Long. Ronnie and Lila are both members of the CRST, as was Maxine before her

death. Kenneth was not a member of the CRST.

[¶3] The bank provided Kenneth and the Long Company with various loans. It is undisputed that CRST members have at all times relevant owned at least 51% of the outstanding stock in the Long Company. Native American control of the Long Company was required in order to qualify for Bureau of Indian Affairs ("BIA") guarantees of the loans of the bank to the Long Company. *See* 25 C.F.R. § 103.7. Some of the Long Company's loans from the bank were guaranteed by the BIA.

[¶4] Prior to his death on July 17, 1995, Kenneth owned 2,230 acres of deeded agricultural land located within the CRST Indian Reservation. He also owned 49% of the Long Company. The land was used in the Long Company's farming and ranching operation. Kenneth had mortgaged this land and his home in Timber Lake to the bank to secure loans for the Long Company's operations. In his will, Kenneth purported to devise his land and his shares in the Long Company to his four children. Ronnie's brothers and sisters sought to assign all of their interests in the land and the company to Ronnie. The Longs thus claim that Ronnie inherited and controlled all of Kenneth's land and his 49% interest in the Long Company, thereby giving Ronnie and Lila 100% ownership of the Long Company.

[¶5] The bank claims that neither Ronnie nor any of Kenneth's children inherited his Dewey County real estate or his 49% interest in the Long Company. Kenneth's estate is being probated in the Circuit Court for the Eighth Judicial Circuit, Dewey County, South Dakota. Kenneth and the Long Company owed approximately $750,000 to the bank at the time of Kenneth's death. This amount greatly exceeded the value of the assets of Kenneth's estate. The bank filed a creditor's claim against Kenneth's estate on September 26, 1995. Kenneth's second wife, Paulette Long ("Paulette"), was appointed personal representative of the estate, and she

eventually deeded the real estate to the bank in lieu of foreclosure, as discussed below. The bank claims that Kenneth's 49% interest in the Long Company was never distributed by the Circuit Court. The probate estate remains open.

[¶6] In the spring of 1996, an officer of the bank came on the Longs' land on the CRST Reservation and inspected the land, cattle, hay, and machinery. Discussions concerning a new loan agreement took place among bank officers, Ronnie and Lila, and CRST Tribal officers at the CRST Tribal offices on the CRST Reservation. There were discussions involving a deed in lieu of foreclosure, in which Kenneth's land and house would be deeded to the bank, and, in return, the bank would credit $478,000 against the debt owed by Kenneth and the Long Company to the bank. The Longs claim that the bank proposed at that time that it would finance the sale of the Longs' land back to the Longs via a 20 year contract for deed. The bank claims that, although it was discussed, it did not propose a new loan agreement during that visit and nothing was reduced to writing.

[¶7] The Longs claim that the bank thereafter changed the "agreement." In a letter dated April 26, 1996, the bank stated that, on the advice of counsel, it would not sell the land under a contract because of "possible jurisdictional problems if the bank ever had to foreclose on [the] land when it is contracted or leased to an Indian owned entity on the reservation." The bank claims that no agreement was in place up to that point in time. There are no documents that expressly set forth what the Longs claim they were offered by the bank.

[¶8] On December 5, 1996, a meeting occurred at the bank's office in Hoven, South Dakota. The bank and the Long Company entered into a two year lease which gave the Longs the option to purchase the land for $468,000 at the conclusion

of the lease. A part of this agreement involved Kenneth's estate, acting through Paulette, conveying the Dewey County real estate, as well as the house in Timber Lake, to the bank, in lieu of foreclosure. The Long Company's annual Crop Reserve Program (CRP) payments of approximately $44,198 were assigned to the bank for lease payments. The bank and the Long Company entered into a second document, entitled "Loan Agreement." This document staled that the Long Company would be credited $478,000 for the land and house conveyed by Kenneth's estate. Moreover, the document stated that the bank would do a number of things. The bank would request that the BIA increase the guarantee on one of the Long Company's existing loans to 90%. It would request a 90% BIA guarantee on a $70,000 operating loan to be used by the Longs to care for their cattle and crops. Also, if the BIA approved that request, the bank would loan the Longs $37,500 to purchase 110 calves to be fed and pastured with the Long Company's calves to increase income so it could buy back the land from the bank.

[¶9] The Longs claim that the bank breached this agreement by failing to make the operating loans it promised to make. Specifically, the bank never made the $70,000 operating loan or the $37,500 loan, According to the Longs, as a direct result of the bank's failure to make these loans, the Longs were unable to feed or care for their livestock during the severe winter of 1996-1997. The Court takes judicial notice of the terribly harsh winter of 1996-1997, The Longs' cattle were positioned in winter breaks about seven miles from Ronnie's house. Due to blizzards, roads were closed and the Longs were not able to feed their cattle. The Longs claimed the bank knew that the Longs did not have operating money to move their hay several miles to the cattle on Ronnie Long's Indian range unit. The Longs lost 230 cows, 277 yearlings, and 8 horses during the winter of 1996-1997. Obviously, this resulted in a great amount of loss to the Long Company.

[¶10] Conversely, the bank claims that it made application to the BIA for the various guarantees set forth in the loan agreement of December 12, 1996. The bank received no response from the BIA until February 14, 1997, but when it did receive a response, the BIA asked that a more formal application be made. This was not done. The bank contends that it was not automatically required to make the operating loans. Rather, its promise was contingent on the BIA approving its requests. The bank argues that it did make various loans to the Long Company. On December 10, 1996, the bank loaned the Long Company $16,718.46 to pay for tribal leases for the 1997 grazing year. On December 14, 1996, the bank loaned the Long Company an additional $5,000 for operating expenses and $2,250 for the purchase of a snowmobile to get feed to the cattle.

[¶11] Due to the cattle losses and resulting economic circumstances, the Longs lacked the financial resources to exercise their option to purchase the land. On December 5, 1998, the lease expired. The Longs did not vacate the land. Nonetheless, on March 17, 1999, the bank sold 320 acres to Mr. and Mrs. Ralph Pesicka. In June of 1999, the Bank sent a letter to the CRST Court requesting that the CRST Court serve a Notice to Quit on Ronnie describing the entire 2,230 acres. The CRST Court accommodated the bank. The request was approved ex parte by Chief Judge Leisah Bluespruce on June 15, 1999, and was served on the Longs by the CRST Court on June 16, 1999. On June 29, 1999, the bank sold the remaining 1,905 acres to Edward and May Jo Mackjewski on a contract for deed.[1] Why a judge or a court would become involved on behalf of one party to serve a notice to quit is not understandable. The responsibility to prepare and see to the service of a notice to quit lies with the party seeking to start

[1] Neither the Pesickas nor the Mackjewskis are members of the CRST.

the process to evict a party.

[¶12] The Long Company then commenced an action in tribal court seeking a temporary restraining order restraining the bank from selling the land to the Mackjewski's. The bank moved to dismiss, claiming that the tribal court lacked subject matter jurisdiction. Both the bank's motion to dismiss and the Longs' motion for a restraining order were denied. The Longs then amended the complaint to include several causes of action against the bank that sought damages and other relief. The bank counterclaimed seeking eviction of the Longs and damages.

[¶13] A two day jury trial was held on December 6, 2002, and December 11, 2002, before Tribal Judge B.J. Jones. Jones is a member of the State Bar of South Dakota. The jury returned a verdict in favor of the Longs on their claims that the bank breached the loan agreement, discriminated against the Longs based on their status as Indians, and acted in bad faith with regard to its dealings with the Longs, The jury awarded the Longs $750,000 plus prejudgment interest, calculated in the amount of $123,131. Judge Jones gave the Long Company the option to purchase the remaining 960 acres owned by the bank for the sum of $201,600. Both parties appealed, and the trial court decision was affirmed in all respects, including on the jurisdictional grounds raised by the bank.

[¶14] The bank has filed a motion for summary judgment (Doc. 28) seeking a declaratory judgment that the CRST Court lacked subject matter jurisdiction over it in the matter of Long Family Land and Cattle Company Inc. et al. v. Edward and Mary Maciejewski, et al. The bank also claims that the CRST Court and CRST Court of Appeals denied it due process of law. The Long Company filed a motion for summary judgment (Doc. 33) requesting that the Court enter

summary judgment declaring that the CRST Court had jurisdiction to enter the judgment previously discussed.

## DECISION

[¶15] The summary judgment standard is well known and has been set forth by this court in numerous opinions. *See* Hanson v. North Star Mutual Insurance Co., 1999 DSD 34 ¶ 8, 71 F.Supp.2d 1007, 1009-1010 (D.S.D. 1999), Gardner v. Trip County, 1998 DSD 38 ¶ 8, 66 F.Supp.2d 1094, 1098 (D.S.D. 1998), Patterson Farm, Inc. v. City of Britton, 1998 DSD 34 ¶ 7, 22 F.Supp.2d 1085, 1088-89 (D.S.D. 1998), and Smith v. Horton Industries, 1998 DSD 26 ¶ 12, 17 F.Supp.2d 1094, 1095 (D.S.D. 1998). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R. Civ.P. 56(c); Donaho v. FMC Corp., 74 F.3d 894, 898 (8th Cir. 1996). "Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." Mansker v. TMG Life Ins. Co., 54 F.3d 1322, 1326 (8th Cir. 1995).

### I. Jurisdiction

[¶16] Tribal courts must in appropriate cases be given the first opportunity to determine whether the tribal court has the power to exercise jurisdiction over non-Indians. Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 856-57, 105 S. Ct. 2447, 2454, 85 L. Ed. 2d 818 (1985). A district court may perform a *de novo* review of a tribal court's determination of its own jurisdiction. Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation, 27 F.3d 1294, 1300 (8th Cir. 1994), *cert. denied*, 513 U.S. 1103, 115 S. Ct. 779, 130 L. Ed. 2d 673 (1995), (*citing* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 19, 107 S. Ct. 971, 978, 94 L. Ed. 2d 10 (1987)). The Court of Appeals for the Eighth

Circuit has likewise recognized that federal district courts in appropriate cases should not consider a case until tribal court remedies have been exhausted. *Id.* In some cases not falling within the Tribe's inherent sovereign authority, there is no exhaustion requirement because the tribal court simply lacks authority to adjudicate disputes arising from such conduct. *See* Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998). Because both parties participated fully in tribal proceedings, and the issue of jurisdiction was explored by the tribal courts, the question of jurisdiction can now be reviewed by this court. Nat'l Farmers Union Ins. Co., 471 U.S. at 57, 105 S. Ct. at 2454, Duncan Energy, 27 F.3d at 1300, and United States *ex rel.* Kishell v. Turtle Mountain Hous. Auth., 816 F.2d 1273, 1276 (8th Cir. 1987) (stating that ". . . a federal court should stay its hand until tribal remedies are exhausted and the tribal court has had a full opportunity to determine its own jurisdiction . . .").

[¶17] "Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of non-members exists only in limited circumstances." Strate v. A-1 Contractors, 520 U.S. 438, 445, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).[2] In Montana v. United States, the United States Supreme Court held that the inherent sovereign powers of an Indian tribe do not, as a general proposition, extend to the activities of non-members of the tribe. 450 U.S. 544, 565-66, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). The Court described two instances in which tribes could exercise such sovereignty. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Id.* Second, "[a]

[2] Neither party makes mention of any federal statute or treaty conferring subject matter jurisdiction over the Longs' claims in the tribal court.

tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 566.

[¶18] The CRST tribal court considered whether it had subject matter jurisdiction. It concluded that it did have the requisite jurisdiction to hear the lawsuit filed by the Longs, and, as discussed above, judgment was ultimately entered against the bank pursuant to the jury's verdict. The bank appealed to the CRST Court of Appeals, where CRST Chief Judge Frank Pommersheim and Associate Justices Everett Dupris and Patrick Lee considered the jurisdictional arguments, along with the bank's other arguments.

[¶19] Interestingly, on appeal, the bank asked the CRST Court of Appeals to consider a very narrow issue. It did not generally challenge the jurisdiction of the CRST Tribal Court over the lawsuit brought by the Longs against the bank. Rather, relying on Nevada v. Hicks, 533 U.S. 353 (2002), it challenged the tribal court's subject matter jurisdiction only as to the discrimination cause of action, claiming that tribal courts do not have jurisdiction over federal causes of action. The CRST Court of Appeals rendered a written opinion in which it determined that the Longs' discrimination claim is grounded in tribal, not federal, law. Accordingly, the CRST Court of Appeals concluded that the tribal court properly exercised jurisdiction over the case, reasoning as follows:

> This case is the prototype for a consensual agreement as it involves a signed contract between a tribal member and a non-Indian bank. The contract deals solely with fee land located wholly within the exterior boundaries of the reservation. Fee land that was originally owned by the Longs, but owned by the Bank during the

> controverted events in this lawsuit. All bank loans in this matter were provided solely for the ranching operation by the Longs taking place on the Bank's land within the reservation. Numerous meetings of the Bank with the Longs, with Cheyenne River Sioux Tribal Officials, and Bureau of Indian Affairs personnel took place on the reservation, both when the land was owned by the Longs and subsequently when it was owned by the Bank.
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> In addition, the case clearly involves the "economic security" of the tribe in that the Cheyenne River Sioux Tribe (along with the Bureau of Indian Affairs) was a direct participant actively consulted by both the Longs *and* the Bank seeking economic data and support relevant to the cattle operation on the Longs' land. If the economic security of the Tribe was not involved, the tribe would not have played such a large role in these events in seeking to support and advance the opportunity for Tribal members to succeed in their ranching operation on the Reservation.

Doc. 36, Attach. 16, page 10.

[¶20] Indeed, the issue presented here is whether this lawsuit falls within one of the Montana exceptions. The Longs seem to focus most on the first Montana exception; their reliance on it will be discussed below. Amicus continues to urge that the second exception is equally applicable. As the Supreme Court noted in Strate the key to the proper application of the second Montana exception is a recognition that "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . But [a tribe's inherent power does not reach] beyond what is

necessary to protect tribal self-government or to control internal relations.'" Strate, 502 U.S. at 459 (*quoting* Montana, 450 U.S. at 564). The fact that the Long Company is owned by tribal members does not, in and of itself, translate to a finding that the dealings between the bank and the Longs necessarily have an effect on the political integrity, economic security, or the health and welfare of the tribe. If taken to this extreme, tribal jurisdiction would exist in any circumstance where a private entity conducts business with a tribal member. This is clearly not the law as described in Montana and Strate.

[¶21] The written submissions by the Longs focus largely on the first exception discussed in Montana, namely the "consensual relationship" exception. The Longs argue that the bank entered into consensual relationships with Ronnie and Lila Long, who are tribal members, and with the Long corporation when the corporate stock was at all times owned 51% by CRST members. The bank seems to argue that, since the Long Company is a South Dakota corporation, it is not a tribal member. Therefore, the relationship between the bank and the Long Company was nothing more than a relationship between two non-member corporations. This assessment, although perhaps technically correct since a corporation apparently cannot be incorporated tribally, very much ignores important facts of this case. The Long Company is a closely held corporation. CRST members have controlled at least 51% of the Long Company's outstanding stock at all times pertinent to this action. Native American control was necessary in order for the Long Company to qualify for BIA guarantees. The BIA guarantees allowed the bank to make loans to the Longs with greatly reduced risk.[3] In fact, after the

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[3] The very purpose of the BIA loan guaranty program is "to encourage eligible borrowers to develop viable Indian businesses through conventional lender financing. The direct

Longs' cattle died, the bank was able to submit a claim on the BIA guarantees, and the bank received $392,968.55 from the BIA. Simply stated, the loan agreements between the bank and the Long Company were not only crafted with tribal membership in mind; they would not likely have been possible without it.

[¶22] The bank cites Hornell Brewing Co., where the Eighth Circuit noted that "[n]either Montana nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations." 133 F.3d at 1091 (emphasis in original). I was the lower court judge in Hornell. The bank's argument is somewhat misplaced. In Hornell, the dispute centered on an alcoholic beverage styled "The Original Crazy Horse Malt Liquor." The brewery responsible for the beverage did not manufacture, sell, or distribute the malt liquor on the Rosebud Sioux Reservation, and the Court of Appeals specifically noted that Montana's discussion of activities of non-Indians on fee land within a reservation was irrelevant under the facts of that case. "The mere fact that a member of a tribe or a tribe itself has a cultural interest in conduct occurring outside a reservation does not create jurisdiction of a tribal court under its powers of limited inherent sovereignty." *Id.* at 1091. Hornell is readily distinguishable from the facts of the instant case. Most notably, Hornell did not involve the consensual relationship criteria. It involved the question of whether the malt liquor's use of the "Crazy Horse" name had an effect on the political integrity, economic security, or the health and welfare of the tribe. The instant case involves a non-member's direct contractual involvement with a Native American owned corporate entity and concerns land located wholly

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function of the Program is to help lenders reduce excessive risks on loans they make. That function in turn helps borrowers secure conventional financing that might otherwise be unavailable." 25 C.F.R. § 103.2.

within the boundaries of the CRST reservation.

[¶23] Assuming for the moment that tribal tort law was applied, as the CRST appellate court concluded, there are other matters which must be considered in determining whether the tribal courts properly considered the case under the consensual relationship exception. In Strate, 520 U.S. at 457, the Supreme Court identified several cases which fall within this exception. *See e.g.* Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 152-54 (1980) (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status"), Williams v. Lee, 358 U.S. 217 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants), Morris v. Hitchcock, 194 U.S. 384 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation), Buster v. Wright, 135 F. 947, 950 (8th Cir, 1905) (upholding tribe's permit tax on nonmembers for the privilege of conducting business within tribe's borders). Montana provides that "the tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." 450 U.S. at 565-66 (emphasis added). These cases aptly demonstrate tribal power to regulate though taxation, but they do not directly answer the question of whether tort litigation is part of the "other means" which is mentioned in Montana.

[¶24] The bank urges the Court to conclude that tort law does not fall within the rubric of "other means," citing Ford Motor Co. v. Todecheene, 394 F.3d 1 170 (9th Cir. 2005). In

Todecheene, parents of a tribal member who was killed in a one-vehicle accident on the Navaho Reservation in Arizona filed a product liability action in tribal court against the vehicle manufacturer. The Court of Appeals for the Ninth Circuit held that the existence of a financing agreement between the tribe and the manufacturer did not provide a sufficient basis to subject the vehicle manufacturer to the tribal court's jurisdiction on the basis of consensual relations.[4] Also, the Court of Appeals concluded that the tribe's interest in protecting the lives of its member police officers on tribal roads did not provide a sufficient basis to subject the manufacturer to the tribal court's jurisdiction under tribal self-government power.

> The consensual relations exception recognizes that tribes have jurisdiction to regulate consensual relations "through taxation, licensing, or other means." *Montana*, 450 U.S. at 565, 101 S.Ct. 1245. The question here is whether "other means" includes tort law. Tort law does constitute a form of regulation. *See Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 1000 (9th Cir.1987) (recognizing that the implied covenant tort regulates the employment relationship); *see also Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 337-38 (5th Cir.1995) (state

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[4] In reaching this conclusion, the Court of Appeals for the Ninth Circuit followed an interpretive maxim which generally instructs that "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Id.* at 1180, n.6 (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115-115 (2001)). "[E]nforcement through the prolonged and uncertain vehicle of litigation is worlds apart from taxation and licensing mechanisms." *Id.*

> tort law may result in "indirect regulatory impact"). But the Supreme Court in *Strate* appears to have required that the regulation be more directly connected to the contract itself. It would not be illogical to say that Ford agreed to finance the purchase of the Expedition, that the Expedition possibly had a defect, and that the tribe thus has jurisdiction to adjudicate Ford's liability. But one would be hard-pressed to argue convincingly that the product liability action has a direct nexus to the lease itself. It appears somewhat arbitrary to conclude that the Tribe has a greater interest in regulating product defects in vehicles it leases (for which there is a contract between the Tribe and Ford Credit) than in vehicles it purchases for cash (for which there would be no contract with Ford Credit).

Todecheene, 394 F.3d at 1180.

[¶25] What differs in this case is that the claimed tortious conduct of the bank has a clear nexus with the contractual dealings between the bank and the Long Company. The Court does not read Todecheene to completely foreclose the possibility of tribal jurisdiction over tort actions. Rather, Todecheene seems to suggest that there must be a connection between the tort and the dealings between the parties. This connection was absent in Todecheene, where the parties were tenuously tied through a vehicle lease agreement. Conversely, the discrimination claim raised by the Longs relates exclusively to the manner in which the bank treated the Longs in the various agreements concerning the lease with option to purchase land located wholly within the boundaries of the CRST Reservation. For these reasons, Todecheene is inapposite.

[¶26] It is also significant that the bank originally sought relief through the assistance of the CRST courts, Recently, the Court of Appeals for the Ninth Circuit considered Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. 2006), in which a nonmember student at a tribal college brought an action in federal court, alleging that the tribal court lacked jurisdiction over his claims against the tribe. Smith was originally a defendant in the lawsuit, which involved an accident that occurred while he was driving a dump truck owned by the college. Prior to trial, all claims were settled except Smith's cross-claim against the college. Smith litigated his cross-claim in tribal court and a verdict was returned in favor of the college. Following the unfavorable verdict, Smith argued for the first time that the tribal court did not have subject matter jurisdiction. Following a ruling by the district court that the tribal court had jurisdiction, the Court of Appeals considered the Montana factors and concluded that the tribal court properly exercised jurisdiction, holding that "a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a "consensual relationship" with the tribe within the meaning of Montana." *Id.* at 1140.

[¶27] In the instant case, the bank opted to utilize the tribal courts in an attempt to force the Longs off the land it sent a letter to the CRST tribal court asking that a notice to quit be served upon the Longs. The tribal court accommodated the bank and caused the notice to quit to be served on June 16, 1999. The Longs then filed a complaint in tribal court. In response to the Long Company's action in tribal court, the bank counterclaimed, seeking damages and eviction. It is noteworthy that the bank's position as to the tribal court's subject matter jurisdiction has been somewhat equivocal. In many of its tribal court filings, the bank continued to challenge the jurisdiction of the tribal courts. However, in its motion for summary judgment on its counterclaim in Long

Family Inc. et al. v. Edward and Mary Maciejewski, et al., dated September 12, 2002, the bank made various claims, arguing essentially that the lease had expired and the Longs were wrongfully holding over. Appearing in paragraph 2 of that document is the following statement on behalf of the bank:

> The Court has jurisdiction over Long Family Land and Cattle Company, Inc. and Ronnie Long and Lila Long in that the majority ownership of the corporation is owned by Ronnie Long and Lila Long, enrolled members of the Cheyenne River Sioux Tribe and the Court has jurisdiction over the subject matter of this action.

Doc. 50, Ex. 10, page 1 (emphasis added).

[¶28] This is a significant concession by the bank and the bank should be held to it.

[¶29] There is no simple test for determining whether tribal court jurisdiction exists. Questions of jurisdiction over Indians and Indian country remain a "'complex patchwork of federal, state, and tribal law,' which is better explained by history than by logic." United States v. Bruce, 394 F.3d 1215, 1218 (9th Cir, 2005) (quoting Duro v. Reina, 495 U.S. 676, 680 n.1 (1990)). While the Supreme Court has been reluctant to find civil tribal jurisdiction over defendants who are not members of the tribe, its decisions do not foreclose the possibility, particularly where the defendants enter consensual relationships with tribal members through commercial dealings, contracts, leases, or other arrangements. The tribe properly exercised jurisdiction over Long Family Land and Cattle Company Inc. et at. v. Edward and Mary Maciejewski, et al., and there are no genuine issues of material fact remaining for the Court to resolve. The Long Company's motion for summary judgment should be granted in this

regard. The bank's motion should be denied.

**II. Due Process**

[¶30] The bank also argues that it was not afforded fundamental due process rights by the CRST Tribal Courts. As such, it urges the Court not to recognize the tribal court judgment. The bank contends that it proceeded through the tribal court proceedings assuming that the Longs' discrimination claim was based upon federal law. It contends that tribal law was never pled or discussed, the case was tried on a federal discrimination theory, the jury instructions were fashioned based on federal law, and the verdict was upheld over its post trial motions based on federal law. It further argues that, because it did not have adequate notice of the tribal law basis of the discrimination claim, it was not afforded a full and fair opportunity to defend itself and be heard on a tribal law claim of discrimination.

[¶31] The Longs' amended complaint in tribal court made no reference to 42 U.S.C. or § 1981 or any federal statute. It generally alleged that "[t]he sale of the Longs' land to the Pesickas and Maciejewskis on terms more favorable than the bank required of the Longs, constitutes unequal treatment and unfair discrimination against the Longs, and prevented the Longs from buying back their land." The Longs, and the CRST, appearing before the Court as *amicus curiae*, urge that the tribal courts applied tribal law.

[¶32] An examination of the prior proceedings reveals that the bank is correct that the tribal trial court and appellate court are not in accord on the issue. In addressing the bank's argument that the tribal court lacked jurisdiction to enforce federal anti-discrimination laws, the trial court noted that

> [t]he only anti-discrimination laws explicitly contained in the Cheyenne River Sioux Tribal

> Code and Constitution are those prohibiting the Tribe from discriminating or denying equal protection of the laws to persons. The Tribe does not appear to have specific code provisions prohibiting private discrimination and the Court is therefore instructed to look to relevant federal law.

Doc. 32, Ex. 22, p. 9.

[¶33] Clearly, the CRST trial court considered the Longs' discrimination claim essentially a matter of federal law. It was error for the tribal court to interpret or apply federal law. The CRST submitted an amicus brief in conjunction with the appeal. Perhaps guided by CRST' s arguments, the CRST appellate court took a different tack than the trial court, stating that private claims of discrimination are "recognized under the traditional (or common) law of the Cheyenne River Sioux Tribe." Doc. 32, Ex. 24, p. 7. The appellate court treated the Longs' discrimination claim as a tort, and made reference to Cheyenne River Sioux Law and Order Code § 1-4-3, which confers jurisdiction on the tribal court over claims arising out of tortious conduct. The appellate court reasoned as follows:

> Since it is well understood that a claim based on discrimination essentially sounds in tort, jurisdiction over "tortious conduct" necessarily includes jurisdiction over Plaintiffs' discrimination claim. In addition, there is basis for a discrimination claim that arises directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom. Such a potential claim arises from the existence of Lakota customs and norms such as the "traditional Lakota sense ofjustice, fair play and decency to others." *Miner v. Banley*, Chy. R. Sx. Tr. Ct. App., No. 94-003 A,

> Mem. Op. And Order at 6 (Feb. 3, 1995); and "the Lakota custom of fairness and respect for individual dignity." *Thompson v. Cheyenne River Sioux Tribal Board of Police Commissioners*, 23 ILR 6045, 6048 Chey. R. Sx. Tr. Ct. App. (1996). Such notions of fair play are core ingredients in federal and state definitions of discrimination. Therefore a tribally based cause of action grounded in an assertion of discrimination may proceed as a "tort" claim as defined in the Cheyenne River Sioux Tribal Code, as derived from Tribal tradition and custom, or even from the federal ingredients defined at 42 U.S.C. § 2000-2001.

Doc. 32, Ex. 24, p, 8.

[¶34] The Court of Appeals for the Eighth Circuit has noted that it reviews judgments, not opinions, and "may affirm on any ground supported by the record, whether or not that ground was urged below or passed on by the district court." Gralike v. Cook, 191 F.3d 911, 921 n. 9 (8th Cir. 1999). The Court has no reason to believe the law is otherwise in tribal courts, and the bank does not claim that it is.

[¶35] The bank had opportunities throughout the litigation to challenge the source of law for the Longs' discrimination claim. It could have filed a motion to dismiss based upon the vagueness of the Longs' discrimination claim in the amended complaint. It made no such challenge. The factual record at the trial level was fully developed vis-a-vis the claimed discrimination. The gravamen of the bank's appeal was centered on the source of law for the discrimination claim and the CRST appellate court decided the issue, albeit differently than the CRST trial court. It requires no citation of authority to state that an appellate court may find that a lower court

reached the correct result, albeit for the wrong reason. The bank's motion for summary judgment should be denied.

[¶36] Now, therefore,

[¶37] IT IS ORDERED:

(1) The Longs' motion for summary judgment (Doc. 33) is granted. The Cheyenne River Sioux Tribal Court properly exercised jurisdiction over Long Family Land and Cattle Company Inc. et al. v. Edward and Mary Maciejewski, et al.

(2) The bank's motion for summary judgment (Doc. 28) is denied.

(3) No costs will be taxed.

[¶38] Dated this 17th day of July, 2006.

BY THE COURT:
s/
CHARLES B. KORNMANN
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK
BY: s/
DEPUTY (SEAL)

IN THE CHEYENNE RIVER
SIOUX TRIBAL COURT OF APPEALS

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THE BANK OF HOVEN, NOW KNOWN AS PLAINS COMMERCE BANK,
Defendant/Appellant/Respondent

#03-002-A
R-120-99

vs.

MEMORANDUM OPINION AND ORDER

LONG FAMILY LAND AND CATTLE COMPANY, INC. – RONNIE AND LILA LONG,
Plaintiffs/Respondents/Appellants.

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Per Curiam (Chief Justice Frank Pommersheim and Associate Justices Everett Dupris and Patrick Lee).

1. Introduction and Background

The facts in this case involve a series of complex commercial interactions between Ronnie and Lila Long, the Long Family Land and Cattle Company, Inc., Plaintiffs/ Respondents/Appellants (Longs), and Plains Commerce Bank (formerly Bank of Hoven), Defendant/Appellant/Respondent (Bank), dating back to 1989. Kenneth Long was a non-Tribal member whose first wife, Maxine Long, was a member of the Cheyenne River Sioux Tribe. Kenneth and Maxine owned approximately 2,230 acres of Dewey County real estate in fee simple as well as a house in Timber Lake. All of this real estate is located within the exterior boundaries of the Cheyenne River Sioux Reservation. All of this real estate was mortgaged to the Bank for loans to the Long Family Land and Cattle Company, Inc.

Upon the death of Maxine, Kenneth became the sole owner of the real estate in Dewey County. At the time of Kenneth's death on July 17, 1995, Mr. Long and the Long Family Land and Cattle Company owed the Bank

approximately $750,000. Mr. Long's estate acting through Paulette Long, Kenneth's second wife and personal representative of the estate, conveyed the Dewey County real estate, as well as the house in Timber Lake, to the Bank in lieu of foreclosure. As a result of this conveyance on December 5, 1996, the Long Family Land and Cattle Company was given credit for $478,000 on its outstanding debt to the bank.

Ronnie Long is a member of the Cheyenne River Sioux Tribe and is the son of Kenneth Long. Upon his father's death, Ronnie inherited Kenneth's interest in the 2,250 acres of land in Dewey County on the Cheyenne River Sioux Reservation as well as his father's 49% imterest in the Long Family Land and Cattle Company, Inc. The other 51% of the Company is owned by Ronnie and his wife Lila, who is also a member of the Cheyenne River Sioux Tribe. The Company has always been an Indian controlled company.

After Kenneth Long's death, employees of the Bank came to the Longs' land on the Cheyenne River Sioux Reservation to inspect it as well as the cattle, hay and machinery on the land. In addition, Bank officers met several times with the Longs, officials of the Cheyenne River Sioux Tribe, and Bureau of Indian Affairs employees. These meetings all took place on the Cheyenne River Sioux Reservation. All of these activities were directed to establishing a basis from which the Bank would provide new loans to Ronnie Long and the Long Family Land and Cattle Company, Inc. for their ranching operation on this land.

The Bank initially proposed that it would sell the land back to the Longs (which was conveyed to the Bank by the Long Estate) via a 20 year contract for decd. Upon the advice of counsel, in a letter to Ronnie Long dated April 20, 1996, the Bank withdrew this offer because of "possible

jurisdictional problems." (Exhibit 4) The revised proposal of the Bank offered the Longs only a two year lease and option within which to purchase and pay for the land in full.

The Lease with Option to Purchase included a purchase price of $478,000 for the land. The other features of the lease provided that annual Crop Reserve Program (CRP) payments to the Longs were assigned to the Bank and the right of the Longs to exercise their option to purchase for $478,000 at the conclusion of the lease period. Another document captioned "Loan Agreement" was signed by both the Bank and the Longs. It recited a series of debits and credits of the Longs to the Bank, and also stated that the Bank would request that the BIA increase the loan guarantee to 90% of note #98181, that the Bank would make an operating loan to the Longs in the amount of $70,000. The Bank also agreed to make another loan of $53,000 to pay off note #98809 of $17,000 with the balance of $37,000 to be used to purchase 110 cattle. Both the Lease with Option to Purchase and the Loan Agreement were signed by the Bank and the Longs on December 5, 1996.

Shortly thereafter, mother nature intervened with a vengeance during the horrific winter of 1996-97. As a result of the failure to provide the $70,000 loan and the implacable force of the brutal winter, the Longs lost 230 cows, 277 yearlings, and 8 horses. The Bank did provide some additional loans that were quite modest. The Longs never recovered from these financial and weather-related blows and were unable to meet their outstanding debt to the Bank and were not able to exercise their option to purchase.

The Longs did not remove from the property in question at the expiration of the lease. The Bank began (state) eviction proceedings by sending a notice to quit to the Cheyenne River Sioux Tribal Court for service on the Longs. Service was apparently never effectuated. There was never

any hearing or ruling by the stale court. Without any order of eviction and with the Longs remaining in possession of the land. the Bank nevertheless sold the land. On March 17, 1999, the Bank sold 320 acres to Ralph Pesicka for cash and on June 29, 1999, the Bank sold the remaining 1,905 acres to Edward and May Jo Mackjewski on a contract for deed. None of these purchasers are members of the Cheyenne River Sioux Tribe.

The Longs then commenced an action in the Cheyenne River Sioux Tribal Court seeking a restraining order preventing the Bank from selling the real estate. The Bank's motion to dismiss for lack of subject matter jurisdiction was denied as was the Longs motion for a restraining order against the Bank. The Longs subsequently amended their complaint to include several causes of action against the Bank that sought damages and other relief. The Bank counterclaimed seeking eviction of the Longs and damages. The Longs requested a jury trial on their claims. The Bank did not seek a jury trial on its counterclaim.

A two day jury trial was held on December 6 and 11, 2002. At the close of the Plaintiffs' case, Special Judge B.J. Jones dismissed Plaintiffs' claims that sought to void the contract, alleged fraud, failure of consideration, and unconscionability. The jury returned a verdict in favor of the Longs on their claims that the Bank breached the loan agreement, discriminated against the Longs based on their status as Indians, and acted in bad faith with regard to its dealings with the Longs. The jury awarded the Longs $750,000 along with pre-judgment interest. Special Judge B.J. Jones determined that interest to be $123,131. The jury also found that the Bank did *not* use self-help remedies in an attempt to remove Plaintiffs from the land. A supplemental judgment was later entered permitting the Plaintiffs to exercise the Option to purchase the 960 acres of the land they

continued to occupy.

Both sides filed timely notices of appeal with this Court. Oral argument was heard on October 6, 2004.

II. Issues

This appeal involves seven (7) issues raised by the Defendant/Appellant/Respondent and two (2) issues of the Plaintiffs/Respondents/Appellants. They are:

A. Defendant/Appellant/Respondent

1. Whether the Cheyenne River Sioux Tribal Court lacked subject matter jurisdiction for a claim of discrimination against an off reservation bank.

2. Whether the trial court erred in failing to grant Defendant's motion for a directed verdict and judgment N.O.V. on the Plaintiffs' breach of contract claim.

3. Whether the trial court erred in failing to grant Defendant's motion for a directed verdict and judgment N.O.V. on Plaintiffs' separate cause of action based on bad faith.

4. Whether the trial court erred in failing to grant Defendant's motion for a judgment N.O.V. in that the damages awarded by the jury were excessive and controlled by passion.

5. Whether the trial court erred in not granting Defendant's cause of action for eviction against the Plaintiffs.

6. Whether the trial court erred in granting Plaintiffs' motion to exercise its option to purchase some of the real estate sold to Edward and Mary Jo Mackjewski under a

contract for deed.

7. Whether the trial court erred in allowing pre judgment interest on certain damages absent specific instructions to the jury.

B. Plaintiffs/Appellees/Respondents Longs and Long Ranch and Cattle Company, Inc.

1. Whether the trial court erred in its calculation of prejudgment interest.

2. Whether the trial court erred in permitting the Plaintiffs to exercise their option to purchase with regard to only part, rather than all, of the land described in the option to purchase.

Each issue will be discussed in turn.

III. Discussion

A. Defendant/Appellant/Respondent Bank

1. Jurisdiction

The Bank's jurisdictional claim is quite limited in scope and is best understood as involving two separate (but overlapping) legal contentions. As to scope, the Bank argues that the Cheyenne River Sioux Tribal court does not have jurisdiction over the Longs' discrimination claim. Bank's brief at 6-9. This presumably forecloses any federal appeal under the *National Farmers Union* exhaustion doctrine of any other issue involved in this case save the jurisdiction claim relative to the discrimination cause of action. *See e.g., National Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845 (1985). The Bank's two legal arguments, while not drawn

as sharply as they might be, assert that the trial court did not have jurisdiction over the discrimination claim because it is a *federal* claim barred under *Nevada v. Hicks*, 533 U.S. 353 (2002), and because no discrimination cause of action exists as a matter of Cheyenne River Sioux Tribal law. Each of these will be discussed in turn concluding with the pertinent jurisdictional analysis under *Montana v. United States*, 450 U.S. 544 (1981).

a) *Nevada v. Hicks* and Federal Causes of Action

The Bank alleges that Cheyenne River Sioux Tribal Court did not have subject matter jurisdiction over Plaintiffs' discrimination claim against the Bank. It is critical to note that the Bank does *not* challenge (on appeal) the general jurisdiction of the Cheyenne River Sioux Tribal Court over the lawsuit brought by the Longs against the Bank, but only against a single cause of action. Appellant's argument centers its claim on its reading of *Nevada v. Hicks*, 533 U.S. 353 (2002). More precisely, the Bank relies on *Hicks* for the limited proposition that tribal courts do not have jurisdiction over federal causes of action. Appellant's interpretation of *Nevada v. Hicks* in this regard is not incorrect, but it is inapposite. The Court in *Hicks* did hold that tribal courts do not have jurisdiction over a *federal* cause of action alleged under 42 U.S.C. § 1983.[1] The Bank argues by extension that tribal courts would have no jurisdiction over a discrimination claim grounded in 42 U.S.C. § 1981 (c). This is likely true, but misses the point. The Plaintiffs discrimination claim is

[1] The Court's rationale for this holding that there was no congressional delegation of such authority to tribal courts remains unconvincing in light of Justice Stevens' observation that there is no congressional delegation to state courts yet it is unquestioned that state courts have 42 U.S.C. § 1983 jurisdiction. See *Nevada v. Hicks*, 533 U.S. at 402-03 (2002). (Stevens, J. dissenting).

based on a cause of action grounded in tribal, not federal, law.

Plaintiffs' amended complaint did not invoke 42 U.S.C. § 1981 or any federal statute as the source of the discrimination claim and the Bank did not seek to question the source of law for this claim through a motion to dismiss for failure to state a claim on which relief might be granted. In addition, there were no jury instructions provided to the jury on an alleged *federal* cause of action for discrimination. In fact, the Court in the *Hicks* case itself noted that tribal law is often a "complex 'mix of tribal codes and federal, state, and traditional law' " 533 U.S. at 384- 85.

In addition, the Court in *Hicks* concluded:

> that tribal authority to regulate *state officers* in executing process related to the violation, off reservation, of state [criminal] laws is not essential to tribal self-government or internal relations.[2]

The case at bar is not a criminal case, does not involve stale officers, and did not take place off the Reservation. It is therefore totally inapplicable as to causes of action arising on the Reservation involving private individuals. The *Hicks* opinion limited its holding "to the question of tribal court jurisdiction over state officers" leaving "open the question of tribal court jurisdiction and non-member defendants in general." 533 U.S. 358 n. 2.

b) Discrimination Causes of Action Under Tribal Law

Notwithstanding its citation to *Nevada v. Hicks*, the Bank's claim is not really that the Tribal Court does not have subject matter jurisdiction over the discrimination claim, but

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[2] Nevada v. Hicks, 533 U.S. al 364 (2002) (emphasis added).

rather there is no such cause of action under tribal law. In essence, the Bank is claiming that the Longs' discrimination claim should have been dismissed not for lack of jurisdiction, but for a failure to state a claim upon which relief might be granted. This is especially evident in that the Bank's motion to dismiss was not directed to all of the Plaintiffs' claims, but was limited to the discrimination cause of action premised on the (erroneous) theory that it was being pursued as a federal cause of action under 42 U.S.C. § 1981. This more precise claim is also insufficient as a matter of law.

Private claims of discrimination based on status are recognized under federal and state statutes. See, e.g. 42 U.S.C. 2000 (d), *et seq.* (2003), SDCL § 20-13-21 (2003). They are also recognized under the traditional (or common) law of the Cheyenne River Sioux Tribe.[3] While there is no

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[3] Discrimination is prohibited under tribal customary law in much the same way that other injurious or tortious conduct is prohibited under the common law. While it is true that discrimination is frequently the subject of legislation, it is also actionable under the common law. The Supreme Court has long recognized that "an action brought for compensation by a victim of ... discrimination is, in effect, a tort action." *Meyer v. Holley*, 537 U.S. 280, 285, 123 S.Ct. 824, 828 (2003) (citing *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005 (1974)). In *Curtis*, the Court held that a claim for damages under the Civil Rights Act of 1968 "sounds basically in tort" and "is analogous to a number of tort actions recognized at common law." 415 U.S. 189, 195-196, 94 S.D. 1005, 1008-1009. The Court noted that, "[a]n action to redress racial discrimination may ... be likened to an action for defamation or intentional infliction of mental distress," and further that "under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort." 415 U.S. at 195-196, n. 10, 94 S.Ct. at 1008-1009, 10.

express tribal ordinance creating a civil cause of action based on discrimination, there are nevertheless at least two other sources of tribal law that do recognize such a cause of action. They are tribal common law and the Cheyenne River Sioux Law and Order Code § 1-4-3 which confers jurisdiction on the trial court over claims arising out of "tortious conduct."

Since it is well understood that a claim based on discrimination essentially sounds in tort jurisdiction over "tortious conduct" necessarily includes jurisdiction over Plaintiffs' discrimination claim.[4] In addition, there is basis for a discrimination claim that arises directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom. Such a potential claim arises from the existence of Lakota customs and norms such as the "traditional Lakota sense of justice, fair play and decency to others," *Miner v. Banley*, Chy. R. Sx. Tr. Ct. App., No. 94-003 A, Mem. Op. and Order at 6 (Feb. 3, 1995); and "the Lakota custom of fairness and respect for individual dignity." *Thompson v. Cheyenne River Sioux Tribal Board of Police Commissioners*, 23 ILR 6045, 6048 Chey. R. Sx. Tr. Ct. App. (1996). Such notions of fair play are core ingredients in federal and state definitions of discrimination. Therefore a tribally based cause of action grounded in an assertion of discrimination may proceed as a "tort" claim as defined in the Cheyenne River

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These are precisely the kinds of actions over which the tribal courts have jurisdiction. Under tribal law, the courts "have jurisdiction over claims and disputes arising on the reservation." CRST By-Laws, Art. V, § 1(c), including claims arising out of "tortious conduct." Cheyenne River Sioux Tribal Code § 1-4-3. Cheyenne River Sioux Tribe's Amicus Brief at 14, footnote 3.

[4] One kind of classical tort is the harm that results from the differential and invidious treatment of one individual by another individual or entity.

Sioux Tribal Code, as derived from Tribal tradition and custom, or even from the federal ingredients defined at 42 U.S.C. § 2000-2001.[5]

The core of the Longs' discrimination claim was based on the Bank's letter to the Longs dated April 26, 1996, (Exhibit 4, TR 106-07, 330) in which the Bank withdrew its offer to sell the land back to Longs on a 20 year contract for deed because it involved an "Indian owned entity" and related (but unidentified) "jurisdictional problems." The Bank's subsequent offer as contained in the lease with option to purchase required *full* payment within 60 days of the expiration of the two year lease. (Exhibit 7) It is also significant to recall that the land involved is fee land not trust land. While trust land does involve certain federal restrictions on alienability, fee land does not. The Longs contended that this adverse and differential treatment of them was based on their status as "Indians" and constituted discrimination, a question that was ultimately resolved in their favor by the jury verdict.

It is a testament to the vitality and dignity of American jurisprudence that it would most certainly shock the conscience if a claim of discrimination – especially one based on the disparity of treatment on account or race or status – would not be cognizable in state or federal court. In this vein, the Cheyenne River Sioux Tribal Court is no different from its federal and state brethren in its unwillingness to ignore claims of discrimination. In the area of discrimination, there is a direct and laudable convergence of federal, state, and

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[5] Note this last theory is not the pursuit of a *federal* cause of action in tribal court like the 42 U.S.C. § 1983 claim in *Nevada v. Hicks*, but that of a "borrowing" of federal law to stand in or amplify tribal law where it is necessary. *See, e.g.*, Cheyenne River Sioux Tribal Law and Order Code, Title VII Rule 1 (d).

tribal concern.

c) Jurisdiction under *Montana v. United States*

Since there is a discrimination cause of action under Tribal law involving fee land, the most relevant case for jurisdictional purposes therefore is not *Nevada v. Hicks* but *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, the Court held that tribal courts generally do *not* have jurisdiction over non-Indians involving matters that arise on fee land within the reservation. This presumption against tribal court jurisdiction is nevertheless subject to *Montana's* well-known proviso which states: "to be sure, Indian tribes retain sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing or other means, the activities of members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements... A tribe may also retain inherent power to exercise civil authority over non-Indians on fee lands within its reservation when that conduct threatens charities or has some effect on the political integrity, economic security, or the health or welfare of the tribe." 450 U.S. 565-66 (citations omitted).

It is clear that the case at bar satisfies both prongs. This case is the prototype for a consensual agreement as it involves a signed contract between a tribal member and a non-Indian bank. The contract deals solely with fee land located wholly within the exterior boundaries of the reservation. Fee land that was originally owned by the Longs, but owned by the Bank during the controverted events in this lawsuit. All bank loans in this matter were provided solely for the ranching operation by the Longs taking place on the Bank's land within the reservation. Numerous meetings of the

Bank with the Longs, with Cheyenne River Sioux Tribal Officials, and Bureau of Indian Affairs personnel took place on the reservation, both when the land was owned by the Longs and subsequently when it was owned by the Bank.

It is somewhat misleading for the Bank to identify itself as an *off* reservation Bank, because it *owned* the land *on* the Reservation that is the subject of this lawsuit. As a result, the Bank is more accurately described as owning properly and engaged in business activities *both* on and off the Reservation.

In addition, the case clearly involves the "economic security" of the Tribe in that the Cheyenne River Sioux Tribe (along with the Bureau of Indian Affairs) was a direct participant actively consulted by both the Longs *and* the Bank seeking economic data and support relevant to the cattle operation on the Longs' land. If the economic security of the Tribe was not involved, the Tribe would not have played such a large role in these events in seeking to support and advance the opportunity for Tribal members to succeed in their ranching operation on the Reservation.

2. Breach of Contract Cause of Action

Appellant Bank asserts that the Longs' breach of contract claim was improperly submitted to the jury or if properly submitted to the jury, improperly decided by it because *no* contract existed as a matter of law or fact. In particular, the Bank contends that the key document captioned "Loan Agreement" which was prepared by the Bank and signed by both the Bank and the Longs on December 5, 1996 and recites, among other things, the Bank's commitment to provide two loans to the Long Land and Cattle Company, was not a contract at all. It was merely some kind of balance sheet that mainly recited a list of debts and

credits relative to the real estate conveyed by the Long Estate to the Bank. In essence, according to the Bank, there was no consideration and hence no contract.

In the Bank's motion for judgment N.O.V. on this issue, Judge B.J. Jones decided against the Bank finding there was sufficient consideration when the "Loan Agreement" is considered as part of the Lease with Option to Purchase under the integrated document doctrine. These documents were contemporaneous, applied to the same subject matter, and were interrelated as to terms. *See Battey Steamship Comp. v. Refineria Panama S.A.*, 513 F.2d 735, 738 n. 3 (2d Cir. 1975). Judge Jones had already adopted the integrated document doctrine in denying the Defendant's motion for summary judgment on its counterclaim for eviction and it appropriately became the law of the case. This Court now adopts the substance of this rule as appropriate law within this jurisdiction. In this view, it is reasonable to construe the Loan Agreement along with the Lease with Option to Purchase and find sufficient consideration provided by the Longs in their commitment to assign their CRP payments to the Bank and their commitment to continue the operation of their ranch in an attempt to pay off their debts to the Bank without the Bank having to resort to legal action and the less than complete loan guarantees provided by the BIA.

The analysis set out by Judge Jones in his well-reasoned opinion of June 7, 2003 is persuasive. As noted above, there certainly was enough evidence submitted to the jury for it to have found adequate consideration. In reviewing a jury's determination on a motion for a judgment N.O.V., the South Dakota Supreme Court has established a reasonable standard of review, which this Court adopts. This standard directs the reviewing court to review the testimony and evidence in a light most favorable to the verdict or nonmoving party and then to decide without weighing the

evidence if there is evidence which did support the verdict. *Matter of Estate of Holan*, 621 N.W.2d 588, 591 (SD 2000).

In sum, the application of the integrated documents doctrine is an appropriate legal standard within this jurisdiction. In addition, its legal elements of contemporaneity, similar subject matter, and interrelatedness of terms were also satisfied as a matter of law and there was a sufficient factual basis for the jury to find there was adequate consideration for a contract, and the Bank's failure to perform breached this contract.

3. Bad Faith Cause of Action

In a similar vein to the breach of contract claim, the Bank makes two contentions. First, that such a cause of action does not exist as a matter of law because it is subsumed in the breach of contract claim and second, even if such an independent cause of action does exist, there was insufficient evidence submitted to the jury to sustain a verdict upholding such a bad faith claim.

The question of law concerning a bad faith cause of action involves an issue of first impression within this jurisdiction. The trial court ruled that such a cause of action does exist within this jurisdiction and that it is one that is independent of any breach of contract claim. More precisely it might be stated that the trial court ruled that the bad faith claim *derives from* but is *severable* and hence independent of the breach of contract claim. As Judge Jones stated in his order of June 7, 2003 on the post-trial motions, the heart of the breach of contract claim was the failure to *provide* the $70,000 loan, while the heart of the bad faith claim was the Bank's failure to follow through with its promise to seek an increase in the level of the BIA guarantee for several outstanding loans.

This statement of the governing law is reasonable and appropriate. While it appears that no other tribal court has addressed this issue, it is true that the rule articulated by the trial court is within the ambit of both South Dakota Law, *see e.g. Garrett v. Bank West, Inc.*, 459 N.W.2d 833 (SD 1990) and the general rule as articulated in the *Restatement 2nd of Contracts* § 204 (1990) that every contract includes an implied covenant of good faith and fair dealing which prohibits either contracting party from preventing or injuring the other party's right to receive the agreed upon benefits of the contract.

The Bank's challenge to the sufficiency of the evidence in this issue is likewise rejected. Given the standard of review articulated in Part IIIA2 at p. 11, clearly there was sufficient evidence in the record concerning the Bank's failure to respond to the BIA's request for a mote detailed application relative to potential increased loan guarantees from which the jury might conclude that the Bank acted in bad faith.

4. Excessive Damages Controlled by Passion or Prejudice

The jury awarded damages to the plaintiffs in the amount of $750,000. The Bank claims this was "excessive and controlled by passion and prejudice." (Bank's brief at 16.) This conclusion remains just that, a conclusion unsupported by reason or law. Plaintiffs sought damages in the amount of $1,236,792 (Exhibit 23) and thus the award of $750,000 represents an award of only 60% of the amount requested. The trial judge also sustained a number of objections made by the Bank to the Plaintiffs' claimed damages and Exhibit 23 was changed accordingly. The Bank did not object, stating, "I have no objections with these changes," TR 308 and therefore the Bank waived any subsequent right to appeal. The absence of 'prejudice' is also further evidenced by the jury's rejection

of the Longs' claim of improper self-help eviction by the Bank.

The Plaintiffs provided extensive evidentiary data and testimony relative to their damages. The Bank had the same opportunity. Given the appropriate standard of review in challenging a jury finding of fact as noted above, this Court cannot conclude that the jury award in this context lacked a sufficient factual predicate, even disregarding the Bank's waiver of this issue.

Ordinarily, this would conclude the Court's analysis of this otherwise legitimate issue, but for the Bank's decision to characterize the entire trial as "tainted":

> Once a claim for discrimination was allowed to be tried to the jury, where no one but tribal members could serve, the Bank could no longer obtain a fair trial. Allegations of racial discrimination by a nonmember Bank located off the reservation *completely enflamed the jury*. They became incapable of rendering a fair and impartial verdict. The *race card tainted* the entire trial process. (emphasis added) (Bank's brief at 23).

This rhetoric is itself inflammatory. At oral argument, counsel for the Bank admitted that he did not challenge any juror for cause, did not challenge the jury panel as a whole because it did not contain any non-tribal members, and perhaps most importantly, he did *not* request that the trial court use its discretionary power under Sec. 1-6-1(2) of the Tribal Code to "adopt procedures whereby non-enrolled Indians and non-Indians may be summoned for jury duty in cases in which one or more non-Indian parties are involved."

The Bank, apparently excusing its own ('benign')

II

FACTUAL ALLEGATIONS

1. Kenneth Long owned approximately 2,225 acres of deeded agricultural land located within the Cheyenne River Sioux Tribe (hereinafter CRST) Indian Reservation. Kenneth Long owned the land since 1958.

2. Kenneth Long is the father of Ronnie Long, Robert Long, Terry Long, and Myrna Fiddler.

3. The Company was formed with Kenneth and Maxine Long (Ronnie Long's mother and father) and Ronnie and Lila Long (husband and wife) as stockholders. The Company was formed to qualify for Bureau of Indian Affairs guaranteed loans from area banks. Maxine Long, Ronnie Long, and Lila Long are enrolled members of the CRST, and they have always owned over 50% of the Company. Thus, the Company has always been an Indian controlled corporation because CRST enrolled members have always owned over 50% of the Company. Maxine Long died in 1992. After her death Ronnie and Lila Long inherited some of her shares, and they then owned over 50% of the Company, and it continued to be an Indian controlled corporation entitled to BIA guaranteed bank loans.

4. Kenneth Long mortgaged his 2,225 acres of land to the Bank of Hoven as collateral for the obligations of the Company to the Bank of Hoven.

5. Bank of Hoven loaned money to the Company. Several of the Bank of Hoven loans to the

Company are guaranteed by the Bureau of Indian Affairs (hereinafter BIA). The Bank of Hoven took liens on the cattle, horses, machinery, feed, and grain of the Company, as well as a mortgage on Kenneth Long's land.

6. Kenneth Long died July 17, 1995. In his will, Kenneth Long bequeathed his 2,225 acres of land and his stock in the Company to his four children. In December of 1995, three of the children transferred their interest in Kenneth Long's land and shares in the Company to Ronnie Long. Thus, as of December of 1995, under Kenneth Long's will Ronnie Long owned the 2,225 acres of land, subject to the mortgage and debt owed to the Bank of Hoven, and the 49% of the Company stock that was owned by his father, Kenneth Long. Paulette Long, an enrolled member of the CRST, Kenneth Long's second wife and personal representative of the estate of Kenneth Long, signed a Personal Representative's Deed transferring the 2,225 acres of land to the Bank of Hoven without the written authorization of Ronnie Long to do so.

7. In the spring of 1996, employees of the Bank of Hoven came to the Long land on the CRST reservation, and inspected the 2,225 acres and the cattle and machinery on the land. The Bank of Hoven proposed an agreement to Ronnie and Lila Long. The Bank of Hoven discussed the terms of the bank's proposed agreement. Discussions about the proposed agreement also took place with Bank of Hoven officers at the Planning Office of the CRST on the CRST reservation.

The Bank of Hoven represented to the Longs that the Company was insolvent because the debt owed to the bank exceeded the value of all assets that were subject to the liens and mortgages of the bank. A proposed agreement was discussed between Bank of Hoven, Ronnie and Lila Long, and the Company. The proposed agreement involved several points: (a) the 2,225 acres of land would be deeded to the Bank of Hoven, and the bank would credit against and satisfy debt owed by the Company and Ronnie and Lila Long to the bank in the sum of $478,000; (b) the Longs would lease with option to purchase back their 2,225 acres of land from the bank for a period of two years, and at the end of the two years they would buy back their land from the bank for $478,000, minus certain credits for the house proceeds and the CRP payments. There was a Conservation Reserve Program (CRP) contract in Kenneth Long's name bequeathed under his will to Ronnie Long on 1,281 acres of the 2,225 acres. CRP held a first mortgage on such 1,281 acres. Under this CRP contract, the United States Government paid $34.50 per acre for a total CRP payment of approximately $44,198 per year. Under the agreement, the Company received $44,198 per year CRP payment that the company assigned to Bank of Hoven, which was counted as "rent" for the two year agreement period. At the end of two years, the two CRP payments received by the Bank of Hoven as "rent" of $88,396, minus interest at 8.5% for two years, was to be credited to reduce the option purchase price. The agreement also provided the proceeds from the sale of Kenneth Long's house would be

applied to reduce the option purchase price for the house. The house sold for $30,000, and the net balance was to be deducted from the lease purchase option of the 2,225 acres of land; (c) Bank of Hoven agreed to request that BIA increase the BIA guarantee from 84% to 90%, and reschedule note #98181 over 20 years with an annual payment; (d) Bank of Hoven would request a BIA guarantee on a new operating loan of $70,000; (e) Bank of Hoven would make a new loan of $53,000 to pay off note #98809 of $17,000, with the balance of $37,500 to be used to purchase 110 replacement heifers to be fed and pastured with the Longs' cattle; and (f) Bank of Hoven would enter into a lease purchase agreement which would provide that the Longs could buy back their 2,225 acres of land.

8. A written agreement was prepared by the bank in two documents entitled (1) Loan agreement between Long Family Land and Cattle Co. Inc. and the Bank of Hoven, and (2) Lease With Option To Purchase (together referred to as the agreement). Both documents are dated the same, December 5, 1996. The two documents are part of the same agreement. The Bank of Hoven prepared both agreements. On December 5, 1996, Bank of Hoven represented that the 2,225 acres of land had been deeded to the Bank of Hoven prior to December 5, 1996, by the personal representative of the estate of Kenneth Long.

9. At all times during the negotiations and signing of the agreement, the bank was represented

by its lawyer, however, Ronnie and Lila Long and the Company did not have the benefit of a lawyer representing them. The Longs trusted the bank to treat them fairly in this complicated financial transaction which they did not understand.

III

COUNT ONE

FRAUD AND DECEIT

1. Plaintiffs reallege the foregoing paragraphs.

2. Paulette Long, an enrolled member of the CRST, Kenneth Long's second wife and personal representative of the estate of Kenneth Long, signed a Personal Representative's Deed transferring the 2,225 acres of land to the Bank of Hoven based on representations of the Bank of Hoven, that the estate was insolvent because the amount of debt owed to the bank exceeded the value of the assets subject to the liens and mortgages of the bank.

3. Ronnie and Lila Long on behalf of the Company, signed the agreement presented by the bank, in reliance upon the representations by the bank. On December 5, 1996, the bank represented to Ronnie and Lila Long that the bank had previously received the deed to the 2,225 acres signed by Paulette Long, that the estate and the Company were insolvent, and that Ronnie and Lila Long had no choice but to sign the agreement. The bank also represented and promised that the bank would perform the actions and

make the loans set out in the agreement. Absent such representations, Ronnie and Lila Long on behalf of the Company would not have signed the agreement. Such representations were not true, and the bank failed to perform on its promises. Such representations and negligent misrepresentations were relied upon by Ronnie and Lila Long and the Company to their detriment.

4. Based on the representations, negligent misrepresentations, and promises of the bank, the bank received a deed to the 2,225 acres of land and insurance proceeds of $100,000 from the Kenneth Long estate, the CRP payments, and the house sale proceeds. However, (a) note #98809 was not rescheduled by the bank; (b) the new operation loan of $70,000 was not made by the bank; (c) the new loan for $53,500 to purchase 110 replacement heifers was not made by the bank; (d) the bank failed to properly and timely apply for the increase in the BIA guarantees from 84% to 90%; (c) [sic] the bank failed to properly and timely apply for the annual interest subsidy from BIA for several years; (f) the bank failed to recognize the Longs' exercise of their option to purchase their land back; and (g) the bank failed to give credit for the CRP payments and house sale proceeds, which were received by the bank, on the option to purchase and purchase price of the land. The purpose of these new loans was to put the Longs in a stronger financial position so they could purchase back their 2,225 acres of land from the bank in two years. These promises of new loans to pay for necessary operating

expenses and to purchase 110 replacement heifers were not kept by the bank. As a direct result, the Longs were unable to feed or care for their livestock during the severe winter of 1996-1997. Bank of Hoven knew that the Longs had a supply of hay, and that the Longs did not have operating money to move their hay 20 miles to their cattle that needed the hay on their Indian range unit. The bank knew that the cattle did not have feed. The bank knew that cattle without feed cannot survive very long in severe winter weather. The Longs lost 230 cows, 260 yearlings, and 3 horses. The livestock that died in the winter of 1996-1997 had a value of approximately $400,000, plus the loss of income from calves in the future.

5. The bank is liable to Ronnie and Lila Long and the Company for damages they suffered as a proximate result of the fraud and deceit of the bank, together with exemplary damages. The title and possession of the 2,225 acres of land should be returned to the Longs.

IV

COUNT TWO

BREACH OF CONTRACT

1. Plaintiffs reallege the foregoing paragraphs.

2. Ronnie and Lila Long and the Company claim that the agreement was breached in several important and material respects, including but not

limited to: The bank received a deed to the 2,225 acres of land, and insurance proceeds of $100,000 from the Kenneth Long estate, the CRP payments, and the house sale proceeds, however, the bank failed to perform as promised: (a) note #98809 was not rescheduled by the bank; (b) the new operating loan of $70,000 was not made by the bank; (c) the new loan of $53,500 to purchase 110 replacement heifers was not made by the bank; (d) the bank failed to properly and timely apply for the increase in the BIA guarantees from 84% to 90%; (e) the bank failed to properly and timely apply for the annual interest subsidy from BIA for several years; (f) the bank failed to recognize the Longs' exercise of their option to purchase their land back; and (g) the bank failed to give credit for the CRP payments and house sale proceeds, which were received by the bank, on the option to purchase and the purchase price of the land. The purpose of these promised new loans was to put the Longs and the Company in a stronger financial position so they could purchase back their 2,225 acres of land from Bank of Hoven in two years. These promises of new loans to pay for necessary operating expenses and to purchase 110 replacement heifers were breached by the bank.

3. As a direct result of the breach of agreement by the bank, the Longs were unable to feed or care for their livestock during the severe winter of 1996-1997. The bank knew that the Longs had an adequate supply of hay, and the bank knew that the Longs did not have the operating money to move their hay 20

miles to their cattle that needed the hay on their Indian range unit. The bank knew that the cattle did not have feed. The bank knew that cattle without feed cannot survive very long in severe winter weather. The bank knew that if the bank did not make the new operating loan as promised the cattle would have no feed and would die. The bank breached the agreement and did not make the new operating loan as agreed. As a direct result of the bank's breach of the agreement, the Longs and the Company lost 230 cows, 260 yearlings, and 3 horses. The livestock that died in the winter of 1996-1997 had a value of approximately $400,000, and additional cattle died thereafter. This breach of the agreement caused the Longs and the Company to be financially unable to buy back their land from the bank.

4. The bank is liable to the Longs and the Company for such loss and damages which directly resulted from the bank's breach of the agreement.

V

COUNT THREE

FAILURE OF CONSIDERATION

1. Plaintiffs reallege the foregoing paragraphs.

2. The Longs and the Company believe there has been a failure of consideration which voids the agreement and they should get the deed back to their land. The 2,225 acres worth $478,000 was transferred to Bank of Hoven, the bank received insurance

proceeds of $100,000, the bank received CRP payments from the land of approximately $88,396, and the bank received net proceeds from the sale of the house of approximately $25,478, but the bank did not make the loans that the bank promised and that the Longs and the Company needed. The promised operating loan of $70,000 would have enabled the Longs to move their hay to their cattle and take care of their cattle during the winter.

3. Failure of the bank to make the loan of $70,000 to pay operating expenses, and the loan of $53,500 to purchase an additional 110 replacement heifers, made it impossible for the Longs to buy back their 2,225 acres of land. The purpose of buying the 110 replacement heifers was to increase Long's income over the next two years so they could afford to buy back their land. The Longs were unable to purchase the 110 replacement heifers, and they lost the income from the calves each year in the future from these replacement heifers. In addition, they were unable to care for and feed the cattle they had, and as a direct result they suffered a $400,000 loss of livestock. The livestock that died included production cows that would have had calves in the spring, thus, they also lost the income from the calf crop each year thereafter.

4. The bank's failure to make the loans as promised caused the Longs and the Company to suffer a $400,000 loss of livestock, plus loss of income from calves in the future, plus the Longs were unable to buy back their land from the bank. The bank received

approximately $691,874 in cash and value in the deed to the 2,225 acres of land, the CRP payments, life insurance proceeds, and the house sale proceeds, but the Longs and the Company did not get what they bargained for. The Longs and the Company claim that such failure of consideration voids the agreement, and they should get the deed and the land back from the bank.

VI

COUNT FOUR

CONTRACT AND DEED ARE VOID

1. Plaintiffs reallege the foregoing paragraphs.

2. The Longs and the Company believe that the failure of the bank to make the loan of $70,000 to pay operating expenses, and the loan of $53,500 to purchase an additional 110 replacement heifers, made it impossible for the Longs and the Company to perform under the agreement and buy back their 2,225 acres of land. The purpose of buying the 110 replacement heifers was to increase Long's income over the next two years so they could afford to buy back their land. The Longs were unable to purchase the 110 replacement heifers, and they lost the future calf income from these heifers. In addition, they were unable to care for and feed the cattle they had, and as a direct result they suffered a $400,000 loss of livestock, plus the loss of income from calves in the future. With these losses it was impossible for the Longs to buy back their land.

3. The failure of the bank to perform made it impossible for the Longs to perform and buy back their 2,225 acres of land from the bank. The Longs claim that the failure of the bank to perform voids the agreement, and they should get the deed back from the bank.

4. At the end of the two year period the Longs requested a 60 day period to complete an agreement with investors who would provide the money for the Longs to buy back their land from the bank. The bank knew that the Longs and the Company wished to buy back their land from the bank. The bank failed to credit against the option payment the house sale proceeds and the CRP payments that the bank had received. The bank wrongfully refused the Longs' request, although the agreement provides a period of 60 days to pay the purchase price.

5. The failure of the Bank of Hoven to perform as agreed made it impossible for the Company and Ronnie and Lila Long to perform under the agreement and buy their land back. Therefore, the agreement and the deed of the 2,225 acres of land to the Bank of Hoven are void.

## VII

## COUNT FIVE

## SELF HELP

1. Plaintiffs reallege the foregoing paragraphs.

2. The Longs kept possession of the 2,225 acres after the end of the two year period on December 5,

1998, because the bank had not performed as promised under the agreement. At that time, the Longs and the Company had their cattle and machinery on the land and they were in the process of putting up hay on the land.

3. On May 19, 1999, Bank of Hoven signed a Notice To Quit as part of the bank's effort to evict the Longs from the 2,225 acres of land. On June 4, 1999, the bank sent a Notice To Quit to the Cheyenne River Sioux Tribal Court. The bank requested that the CRST Court serves the Notice To Quit on the Longs to begin the bank's eviction process. The Longs and the Company did not quit but remained on the land because the bank had not performed as promised under the agreement.

4. Without first obtaining a Tribal Court order to do so, the bank sold 320 acres of the 2,225 acres of land for cash to Ralph H. and Norma J. Pesicka, on March 17, 1999.

5. On June 25, 1999, without first obtaining a Tribal Court order to do so, the bank sold 1,905 acres of the 2,225 acres of land to Edward and Mary Jo Maciejewski on a contract for deed. The contract for deed provides (a) buyers have immediate possession of Parcel 1, (b) that the bank is in the process of evicting the Longs from Parcel 2, (c) that the buyers shall have possession of Parcel 2 when the eviction is accomplished, and (d) if eviction of the Longs is not accomplished by June 1st of any year, then the

buyers will have possession on June 1st of the following year.

6. The bank and its buyers, Pesicka and Maciejewski, have interfered with and prevented the Longs and the Company from using the farm ground, from pasturing the grass crop, and from harvesting the hay crop on the land. The Longs need the farm ground for crops, need the grass crop for summer livestock grazing, and need the hay crop for winter livestock feed. The Bank of Hoven and its buyer, Pesicka, used 360 acres of pasture land, the bank and its buyer, Maciejewski, drove the Company's cattle off, stopped the Longs' hay harvest, removed the Company's machinery, took the hay harvest, fenced off a portion of the land, and planted crop on 160 acres.

7. The Bank of Hoven and its buyers, Pesicka and Maciejewski, engaged in self help in violation of the CRST Tribal Code and law which caused damage to the Longs and the Company. The bank and Ed Maciejewski are liable to the Longs and the Company for the such damage in an amount established by the evidence at trial.

VIII

COUNT SIX

DISCRIMINATION

1. Plaintiffs reallege the foregoing paragraphs.

2. In selling the Longs' land, the Bank of Hoven unfairly discriminated against the Company and the

Longs, who are enrolled members of the CRST, in favor of Pesickas and Maciejewskis, who are not enrolled members of the CRST.

3. Bank of Hoven required Longs and the Company to pay $468,000 in cash for 2,225 acres, or $210 per acre.

4. Bank of Hoven sold Pesickas 320 acres of the 2,225 acres for $49,600, or $155 per acre. The sale by the bank to Pesickas was $55 per acre less than the bank charged the Longs to buy back their own land.

5. Bank of Hoven sold Maciejewskis 1,905 acres of the 2,225 acres for $401,100 to be paid over ten years with 7.75% interest. Bank of Hoven charged Longs 8.5% interest, or .75% higher interest. The bank allowed Maciejewskis ten years to pay for the land, but the bank would not permit Longs even 60 days to pay for their land.

6. Such unfair discrimination by the bank prevented the Longs and the Company from buying back their land from the bank.

7. The sale of the Longs' land to Pesickas and Maciejewskis on terms more favorable than the bank required of the Longs, constitutes unequal treatment and unfair discrimination against the Longs, and prevented the Longs from buying back their land. The land sales by the bank to the Pesickas and Maciejewskis should be set aside, and the Longs should get possession and title to their land back.

IX

COUNT SEVEN

BAD FAITH

1. Plaintiffs reallege the foregoing paragraphs.

2. The law requires both parties to a contract to perform all requirements of a contract in good faith.

3. Bank of Hoven failed to timely perform in good faith the requirements and actions that the bank represented and agreed to do.

4. The bank failed to timely make a good faith effort to make the loans or perform the other requirements of the agreement between the parties.

5. The bank failed to make protective advances to enable the Longs and the Company to move the hay to the cattle before the cattle perished in the winter of 1996-1997.

6. Such actions and failure to act by the bank constitutes bad faith which caused the Longs and the Company to suffer substantial losses for which the bank is liable.

X

COUNT EIGHT

UNCONSCIONABLE CONTRACT

1. Plaintiffs reallege the foregoing paragraphs.

2. Bank of Hoven employees came to the Long's land on the CRST reservation in the spring of 1996

and inspected the land, and the Longs' cattle, hay, and machinery. The bank designed and proposed an agreement to the Longs. Discussions also took place with bank officers and the Longs and CRST planning officers at the CRST planning office on the CRST reservation. A written agreement was prepared by a lawyer representing the bank.

3. At all times during the negotiations and signing of the agreement, the bank was represented by its lawyer, however, Ronnie and Lila Long and the Company did not have the benefit of a lawyer representing them. The Longs trusted the bank to treat them fairly in this complicated financial transaction, designed and proposed by the bank, which the Longs did not understand. The Longs believed the representations of the bank, that the bank already had received the deed to the 2,225 acres of land, and that the Company was financially insolvent. The Longs felt that they had no choice but to go along with the bank's proposed agreement.

4. The agreement is an unconscionable contract which should be voided and should not be enforced against the Longs in these circumstances. The Longs did not receive the benefits of the agreement. The agreement and the deed to the bank should be voided and the Longs should get their land back.

XI

COUNT NINE

PERMANENT INJUNCTION

1. Plaintiffs reallege the foregoing paragraphs.

2. Plaintiffs are requesting a permanent injunction against Defendant, Bank of Hoven prohibiting the Bank of Hoven from attempting to evict or otherwise interfere with the Plaintiffs' possession of the 2,225 acres of land, so that the Plaintiffs could continue to possess the land and graze their cattle and put up their hay on the land for winter livestock feed, and from prohibiting the bank from selling, renting, or leasing or attempting to sell, rent, or lease the 2,225 acres or any part thereof.

3. Plaintiffs are seeking a permanent injunction against Defendant, Bank of Hoven, as irreparable damage to the Plaintiffs is eminent [sic] without the granting of the injunction as set forth above.

4. The harm to Plaintiffs if the injunction is not granted, far outweighs the resultant damage to the Defendants, if any, if the injunction is granted. If Plaintiffs are not allowed to operate their land, Plaintiffs can no longer afford the operating expenses incurred to date associated with their ranching business, and Plaintiffs will no longer be able to maintain their family ranching operation.

WHEREFORE, the Plaintiffs pray as follows:

1. That the Court find in favor of the Plaintiffs and against the Defendant, Bank of Hoven, and the Court enter a judgment providing that the Defendant, Bank of Hoven is liable to Plaintiffs for damages suffered by Plaintiffs as a result of the fraud and deceit of the bank, together with exemplary damages in an amount to be determined at trial; and that title and possession of the 2,225 acres of land be returned to the Plaintiffs;

2. That the Court find in favor of the Plaintiffs and against Defendant, Bank of Hoven, and that the Court enter judgment providing that the Defendant Bank of Hoven is liable to the Plaintiffs for loss and damages directly resulting from the bank's breach of agreement in an amount determined at trial; and that title and possession of the 2,225 acres of land be returned to the Plaintiffs;

3. That the Court enter judgment in favor of the Plaintiffs and against the Defendant, Bank of Hoven, and provide that due to the failure of consideration, the agreement executed by the parties is null and void, and that the deed and possession of the land be returned to the Plaintiffs; and that the Bank of Hoven shall pay Plaintiffs for the loss of livestock, the loss of income from future calves, the loss of the use of the land,

and all other damages in an amount established at trial;

4. That the Court grant judgment in favor of the Plaintiffs and against Defendant, Bank of Hoven, and provide that due to the failure of Defendant Bank of Hoven to perform the agreement, such agreement and deed to the land are void; and Plaintiffs shall have possession of the 2,225 acres of land;

5. That the Court find that the Defendants Bank of Hoven and its buyers, Pesicka and Maciejewski, engaged in self help in violation of the CRST Tribal Code and law, and are liable to the Plaintiffs for all loss and damage suffered by the Plaintiffs in an amount established by the evidence at trial;

6. That the Court grant judgment providing that Defendant Bank of Hoven is liable to the Plaintiffs for acts of bad faith and for the damages and losses suffered by the Plaintiffs in the amount determined at trial;

7. For a determination that the agreement is an unconscionable contract, and that the agreement and deed to the bank are void, and provide that the deed and possession of the land be returned to the Plaintiffs;

8. For an Order granting a permanent injunction in favor of the Plaintiffs and

against the Defendant, Bank of Hoven, enjoining the Defendants from interfering into Plaintiffs' title, possession and use of their 2,225 acres of land;

9. For Plaintiffs' attorney's fees, costs and expenses incurred herein; and

10. For such and further relief as is just and equitable under these circumstances.

Dated this 3 day of January, 2000.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY: /s/ James P. Hurley
JAMES P. HURLEY
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**PLAINTIFFS DEMAND TRIAL BY JURY**

**[EXHIBIT 21]**

IN CIVIL COURT
CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION

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LONG FAMILY LAND AND CATTLE COMPANY, INC. – RONNIE AND LILA LONG,

#R-120-99

Plaintiffs,

vs.

EDWARD AND MARY MACIEJEWSKI and RALPH H. AND NORMA J. PSICKA, and THE BANK OF HOVEN,

Defendants.

ANSWER OF DEFENDANT'S EDWARD AND MARY MACIEJEWSKI AND BANK OF HOVEN AND COUNTERCLAIM

---

Comes now Edward and Mary Maciejewski, hereinafter referred to as "Maciejewskis" and Bank of Hoven, hereinafter referred to as "Bank", by and through their attorney, David A. Von Wald, and for their Answer to Plaintiffs' Amended Complaint state and allege as follows:

I.

This Court lacks jurisdiction over the parties and the subject matter of this action.

II.

That this Court lacks jurisdiction as to the Maciejewskis, due to the fact that they are Non-Indians, residing on deeded land and not tribal members of the Cheyenne River Sioux Tribe.

III.

That this Court lacks jurisdiction as to the Bank in that the Bank is a South Dakota banking corporation, having its main place of business in Hoven, Potter County, South Dakota, lying outside the boundaries of the Cheyenne River Sioux Indian Reservation. That further, there has been no personal service of process on the Bank.

IV.

For all of the reasons mentioned above, Defendants Maciejewskis and Bank hereby move the Court to dismiss the Plaintiffs' Complaint and Amended Complaint.

V.

That Plaintiffs fail to state a cause of action upon which relief can be granted.

VI.

That Defendants deny each and every other thing and allegation contained in Plaintiffs' Amended Complaint, except as is hereinafter specifically admitted.

VII.

Defendants admit that portion of Plaintiffs' Amended Complaint, factual allegations that Kenneth Long owned 2,225 acres of deeded agricultural land and the same was mortgaged as collateral for certain loans that the Long Family Land & Cattle Company, Inc. had at the Bank. Bank further admits that Kenneth Long died on or about July 17, 1995. Bank admits that the Kenneth Long Estate, through its personal representative, deeded the above-described agricultural, land along with decedent's home in Timber Lake, South Dakota, to the Bank, in lieu of foreclosure. That there was a CRP Enhancement Mortgage to the State of South Dakota that was a first mortgage lien against said agricultural real estate when the same was deeded to the Bank.

VIII.

Bank admits that there was a loan agreement and lease with option to purchase with Long Family Land and Cattle Company, Inc., however, Bank states that these were separate and distinct agreements. Defendants deny each and every other allegation and thing

contained in Plaintiffs' factual allegations except as is hereinabove admitted.

IX.

Defendants admit Paragraph 2 of Count I of Plaintiffs' Amended Complaint and deny each and every other allegation contained in that Count and every other allegation contained in Plaintiffs' Amended Complaint except that the Bank admits that it sold 320 acres of land to Ralph H. and Norma J. Psicka on or about March 17, 1999, and approximately 1,905 acres to Edward and Mary Jo Maciejewski under a Contract for Deed.

X.

That as an affirmative defense, Defendant Maciejewskis allege they were innocent purchasers in good faith and without knowledge of any claim of Plaintiffs in certain land which they purchased and described as Parcel One under the Contract for Deed hereinabove mentioned.

XI.

That as a second affirmative defense, Defendant Bank alleges they did not breach any contract, however, if a breach did exist, which is denied, Plaintiffs failed to mitigate damages.

XII.

That as a third affirmative defense, Defendant Bank claims that Plaintiffs did not exercise their option to purchase the real estate above-described and that they are barred from any claim therein.

COUNTERCLAIM

That although Defendants deny jurisdiction of the Court, in the event the Court finds that it does have jurisdiction, both Defendants make this Counterclaim against Plaintiffs:

I.

That Plaintiffs are wrongfully retaining the real estate described in Plaintiffs' Amended Complaint in that they have failed to tender payment for the option to purchase said real estate in a timely manner and the term of the lease has expired. A copy of said lease with option to purchase is hereto attached and marked as Exhibit "A" and made a part hereof.

II.

That Maciejewskis and Bank have both been damaged by not having the use of said real estate for the 1999 crop year and may additionally sustain damages in the future while Plaintiffs are wrongfully remaining in possession of said real estate.

III.

That both answering Defendants are entitled to damages as a result of Plaintiffs' wrongful possession of said real estate.

IV.

That both answering Defendants are entitled to immediate possession of said real estate, and that Plaintiffs should be evicted form possession of the same.

WHEREFORE, Defendants pray that Plaintiffs' Complaint and Amended Complaint be dismissed, with prejudice, and that the Court enter an Order evicting Plaintiffs from the real estate described in Plaintiffs' Amended Complaint, granting the Defendants possession of the same. That additionally, the Court enter a Judgment against Plaintiffs for damages sustained by Defendants for the wrongful possession of said real estate by Plaintiffs, and for attorney fees, costs, and whatever other relief as to the Court is deemed just and equitable in the premises.

Dated this 3rd day of February, 2000.

/s/ David A. Von Wald
David A. Von Wald
Attorney for Defendants
Edward and Mary Maciejewski
and Bank of Hoven
P.O. Box 468
Hoven, South Dakota 57450
605-948-2550

**[ATTACHMENT 8]**

| | |
|---|---|
| CHEYENNE RIVER SIOUX TRIBAL COURT<br>CHEYENNE RIVER SIOUX TRIBE<br>CHEYENNE RIVER INDIAN RESERVATION | IN CIVIL COURT |
| LONG FAMILY LAND AND CATTLE COMPANY, Inc. – RONNIE AND LILA LONG,<br>Plaintiffs,<br>vs.<br>EDWARD AND MARY MACIEJEWSKI and RALPH H. AND NORMA J. PESICKA, and THE BANK OF HOVEN,<br>Defendants. | MOTION FOR SUMMARY JUDGMENT<br><br>R-120-99 |

Comes now Defendant, Plains Commerce Bank, formerly known as the Bank of Hoven, by and through its attorney, David A. Von Wald, and moves the Court for Summary Judgment on its counterclaim for the following reasons:

1. This Motion is brought pursuant to Rule 56 of the Rules of Civil Procedure of the Cheyenne River Sioux Tribal Law and Order Code.

2. The Court has jurisdiction over Long Family Land and Cattle Company, Inc. and Ronnie Long and Lila Long in that the majority ownership of the corporation is owned by Ronnie

Long and Lila Long, enrolled members of the Cheyenne River Sioux Tribe and the Court has jurisdiction over the subject matter of this action.

3. There are no genuine issues of material fact.

4. Plaintiffs have wrongfully held over possession of a portion of the real estate described in Plaintiff's Amended Complaint after the execution of a Lease With An Option To Purchase entered into on December 5, 1996.

5. The Lease With Option To Purchase wherein Bank of Hoven, now Plains Commerce Bank, was the Lessor and Long Family Land and Cattle Company, Inc. by its terms expired on expired December 5, 1998.

6. Defendant, Plains Commerce Bank, has sold a portion of the real estate which was leased to the Long Corporation to Ralph H. and Norma J. Pesicka and the remaining portion to Edward Maciejewski and Mary Jo Maciejewski. The Maciejewskis, however, have been able to take possession of only about one half of the real estate they bought since Plaintiffs are wrongfully holding over possession of a portion of the real estate. The legal description of the wrongfully retained real estate is as follows:

   The Northwest Quarter (NW¼) of Section Twenty Five (25), all of Section Twenty Eight (28), and the Southwest Quarter (SW¼) of Section Thirty Four (34), all in Township Seventeen (17), Range Twenty Five (25),

East of the Black Hills Meridian, subject to easements, reservations and conveyances, if any, existing and of record.

7. This Motion is made based on the Affidavit of Charles Simon, attached hereto as Exhibit "1", the depositions of the parties, the pleadings and the entire file in this case.

WHEREFORE, Defendant, Plains Commerce Bank, prays the Court grant its Motion for Summary Judgment against Plaintiffs and order that Plaintiffs be evicted from possession of said real estate, granting Defendants possession of the same. And additionally, the Court enter a judgment against Plaintiffs for damages sustained by Defendants for the wrongful possession of said real estate by Plaintiffs, and for whatever other relief as to the Court is deemed just and equitable in the premises.

Dated this 12th day of September, 2002.

/s/ David A. Von Wald

David A. Von Wald, Attorney
for Plains Commerce Bank
P.O. Box 468
Hoven, SD 57450
605-948-2550

**[ATTACHMENT 1]**

CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION

IN CIVIL COURT

[Caption Omitted In Printing]

SPECIAL INTERROGATORY ONE TO JURY

Did the Defendant Bank breach the December 5, 1996 loan agreement (Plaintiff's Exhibit 6) between the Long Family Land and Cattle Co. Inc and the Bank of Hoven?

YES 7 (Number of jurors voting yes)

NO 0 (Number of jurors voting no)

/s/ Rhonda [Illegible]
Foreperson

---

SPECIAL INTERROGATORY TWO TO JURY

If you found in Interrogatory one that the Defendant Bank breached the loan agreement to the Plaintiffs, did that breach prevent the Plaintiffs Long Family Land and Cattle and Ronnie and Lila Long from performing under the lease with an option to purchase (Exhibit 7)?

YES 7

NO 0

/s/ Rhonda [Illegible]
Foreperson

SPECIAL INTERROGATORY THREE TO JURY

Did the Defendant Bank xxxxxxxxxx use self-help remedies in an attempt to remove the Plaintiffs from the land that was subject to the lease with an option to purchase (Exhibit 7)?

YES 0

NO 7

/s/ Rhonda [Illegible]
Foreperson

SPECIAL INTERROGATORY FOUR TO JURY

Did the Defendant Bank intentionally discriminate against the Plaintiffs Ronnie and Lila Long based solely upon their status as Indians or tribal members in the lease with option to purchase. (Exhibit 7)?

YES 7

NO 0

/s/ Rhonda [Illegible]
Foreperson

SPECIAL INTERROGATORY FIVE TO JURY

Did the Defendant Bank act in bad faith when it attempted to gain the increased guarantee from the Bureau of Indian Affairs as referenced in the loan agreement dated December 5, 1996? (Exhibit 6)

YES 7

NO 0

/s/ Rhonda [Illegible]
Foreperson

SPECIAL INTERROGATORY SIX TO JURY

If you answered no to Numbers 1, 3, 4, and 5 you should stop here and not award damages.

If you answered yes to Number 1, 3, 4, or 5 what amount of damages should be awarded to the Plaintiffs?

$ 750,000.00

AGREE 7

DISAGREE 0

Should interest be added to the Judgment?

YES 7

NO 0

/s/ Rhonda [Illegible]
Foreperson

**[ATTACHMENT 12]**

**[LOGO]**

**TRIBAL ENROLLMENT**
**PO BOX 325**
**EAGLE BUTTE, SOUTH DAKOTA 57625**
**605-964-6612/6613**
**FAX: 605-964-6614**

December 9, 2002

TO WHOM IT MAY CONCERN:

This is in regards to Edward and Mary Jo (Kraft) Macijewski [sic] and Ralph and Norma (Long) Pesicka. They are not enroll [sic] with the Cheyenne River Sioux Tribe.

Should you have any question [sic] please feel free to call.

Thanking you for your time and consideration of this letter.

Sincerely,

CHEYENNE RIVER SIOUX TRIBE

/s/ Charlene Anderson
Charlene Anderson
Enrollment Research Specialist

**[ATTACHMENT 14]**

IN CIVIL COURT
CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION

* * * * * * * * * * * * * * * * * * * * * * * * * *

LONG FAMILY LAND AND CATTLE COMPANY, INC. – RONNIE AND LILA LONG,

Plaintiffs,

JUDGMENT

vs.

EDWARD AND MARY MACIEJEWSKI and RALPH H. AND NORMA J. PSICKA [sic], and THE BANK OF HOVEN,

R-120-99

Defendants.

* * * * * * * * * * * * * * * * * * * * * * * * * *

The above-captioned matter came before this Court for trial on December 6, and 11, 2002. Plaintiffs' causes of action for breach of contract, bad faith, discrimination, and violation of self help remedies were submitted to the jury, and Defendant's counterclaim for unlawful entry and detainer was heard by the Court at the same time as the trial evidence was presented to the jury. The jury returned its verdict in the form of interrogatories: (1) for the Plaintiffs on breach of contract, bad faith, and discrimination; (2) for the Defendants on violation of self help remedies;

(3) for the Plaintiffs advising the Court that Defendant Bank's breach of contract prevented the Plaintiffs from performing the lease with an option to purchase; (4) for the Plaintiffs a verdict in the amount of $750,000 against the Defendant, Bank of Hoven, nka Plains Commerce Bank; and (5) directing the Court to award prejudgment interest to the Plaintiffs on the verdict amount of $750,000. Defendant Bank moved this Court post trial for judgment notwithstanding the verdict, or in the alternative for a new trial, and this Court denied the Defendant Bank's motions by an Order dated January 3, 2003, which was recorded January 7, 2003. Now, therefore, based on the decisions of the jury and upon good cause having been shown, it is

ORDERED, ADJUDGED, AND DECREED that judgment be entered in favor of the Plaintiffs, Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long, and against Defendant, Bank of Hoven, nka Plains Commerce Bank, in the sum of $750,000; and it is further

ORDERED, ADJUDGED, AND DECREED that judgment be entered in favor of the Plaintiffs, Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long, against Defendant, Bank of Hoven, nka Plains Commerce Bank, for prejudgment interest in the sum of ~~$167,210~~ [$123,131.81 /s/ BJ Jones Plaintiff's calculation is rejected; Defendant's is accepted.], and it is further

ORDERED, ADJUDGED, AND DECREED that judgment [sic] Plaintiffs, Long Family land and Cattle Company, Inc. and Ronnie [sic] Defendant, Bank of Hoven, nka Plains Commerce Bank, for costs a[illegible] of $2,850.65.

So ordered this 18th day of ~~January~~ Feb., 2003.

BY ORDER OF THE COURT

/s/ [Illegible]
BJ. JONES
Special Judge

ATTEST: Dale Charging Cloud
Dale Charging Cloud, Clerk

## [ATTACHMENT 6]

## PLAINTIFFS' DAMAGES

### 1997

| | |
|---|---|
| 230 bred cows died | |
| January & February 1997 @ $620 = | $ 142,600.00 |
| 260 mixed steer & heifer yearlings died | |
| January & February 1997 @ $700 = | 182,000.00 |
| 10 yearling culls @ $700 = | 7,000.00 |
| CRP Annual Payment = | 44,198.00 |
| | $ 375,798.00 |
| -FEMA Payment | -48,000.00 |
| | $ 327,798.00 |
| Operating Expense (34%) | -112,744.00 |
| | $ 215,054.00 |

---

### 1998

| | |
|---|---|
| 230 bred cows died January & February 1997 | |
| @ 90% calf crop = 207 calves which would have been born in 1998 | |
| 207 yearlings would have been born in 1997 @ $600 = | $ 124,200.00 |
| Operating Expenses (34%) | -42,228.00 |
| | $ 81,972.00 |
| CRP Annual Payment = | 44,000.00 |
| 1998 | $ 125,972.00 |

---

**1999**

| | |
|---|---|
| 330 bred cows @ 90% calf crop = 297 calves born 1999 | |
| 207 yearlings that would have been born in 1998 @ $700 = | $ 144,900.00 |
| Operating Expenses (34%) | -49,266.00 |
| | $ 95,634.00 |
| FSA Payment = | 23,000.00 |
| Use of Land = | 65,000.00 |
| | $ 183,634.00 |

---

**2000**

| | |
|---|---|
| 330 bred cows @ 90% calf crop = 297 calves that would have been born in 2000 | |
| 297 yearlings would have been born in 1999 @ $800 = | $ 237,600.00 |
| Operating Expenses (34%) | -80,786.00 |
| | $ 156,814.00 |
| FSA Farm Program Payment = | 23,000.00 |
| Use of Land = | 65,000.00 |
| | $ 244,814.00 |
| 2000 | $ 244,814.00 Loss |

---

**2001**

| | |
|---|---|
| 330 cows @ 90% calf crop = 297 calves that would have been born in 2001 | |
| 297 yearlings would have been born in 2000 @ $800 = | $ 237,600.00 |
| Operating Expenses (34%) | -80,784.00 |
| | $ 156,816.00 |
| FSA Payment = | 23,000.00 |
| Use of Land = | 55,000.00 |
| | $ 234,816.00 |
| 2001 | $ 234,816.00 Loss |

---

**2002**

| | |
|---|---|
| 330 cows @ 90% calf crop = 297 calves that would have been born in 2002 @ $420 330 x $420 = | $ 138,600.00 |
| 297 yearlings would have been born in 2001 @ $700 = | $ 207,900.00 |
| Operating Expenses (34%) | -117,800.00 |
| | $ 228,700.00 |
| FSA Payment = | 23,000.00 |
| Use of Land = | 50,000.00 |
| Replace Fences = | 9,000.00 |
| | $ 310,700.00 |

**Summary**

| | |
|---|---|
| 1997 | $ 215,054 |
| 1998 | 125,972 |
| 1999 | 183,634 |
| 2000 | 244,814 |
| 2001 | 234,816 |
| 2002 | 310,700 |
| | $ 1,314,990 |

In addition, BIA claims that Longs owe BIA $438,120 for the notes assigned to BIA by Bank of Hoven under the guarantees 438,120

$ 1,753,110

Plus accrued interest.

If the jury awards you damages in this amount plus accrued interest, what will you do with the money?

Pay Bank of Hoven to get the land back (including accrued interest).

Pay BIA (including interest).

Buy cows and yearlings to replace the ones I lost.

## [ATTACHMENT 7]

## NOTES AND COMPUTATIONS

We are using $31.50 per acre x 1,905 acres = $60,000 (Parcels 1 and 2) = $31.50 per acre

For 2 quarters, 320 acres we are using $15.62 per acre = $5,000 = $15.62 per acre

| | |
|---|---|
| 1,905 acres = | $ 60,000 |
| 320 acres = | 5,000 |
| Use value per year | $ 65,000 |

| | | |
|---|---|---|
| Lost | 230 | cows |
| Bought | 110 | (supposed to buy) |
| | 340 | |
| | -10 | cull heifers |
| | 330 | head of cows |

Parcel 1 – 6 quarters, 960 acres
Parcel 2 – 6 quarters, 960 acres
Parcel 3 – 320 acres

**[ATTACHMENT 8]**

**ANNUAL FSA FARM PROGRAM PAYMENTS**

| | |
|---|---|
| 6/30/01 Maciejewski, Inc. (PFC) FSA Farm Program Payment, Parcel 1 | $ 5,896.00 |
| 9/5/00 Maciejewski, Inc. (MLA) FSA Farm Program Payment, Parcel 1 | 6,397.00 |
| Parcel 1: 960 acres (6 quarters) | |
| 6/30/00 Bank of Hoven (PFC) Parcel 2 | $ 5,098.00 |
| 9/5/00 Bank of Hoven (MLA) Parcel 2 | 5,531.00 |
| Parcel 2: 945 acres (6 quarters minus 15 acres) | |
| | $ 22,922.00 |

15 Stat. 635

Native American

Treaty between the United States of America
and different Tribes of Sioux Indians;

Concluded April 29 et seq., 1868;
April 29, 1868.
Ratification advised February 16, 1869;
Proclaimed February 24, 1869.

ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES OF AMERICA, TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

ARTICLE I.

ARTICLE II.

ARTICLE III.

ARTICLE IV.

ARTICLE V.

ARTICLE VI.

ARTICLE VII.

ARTICLE VIII.

ARTICLE IX.

ARTICLE X.

ARTICLE XI.

ARTICLE XII.

ARTICLE XIII.

ARTICLE XIV.

ARTICLE XV.

ARTICLE XVI.

ARTICLE XVII.

Arapahoes.

ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES OF AMERICA, TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at Fort Laramie, in the Territory of Dakota, [now in the Territory of Wyoming,] on the twenty-ninth day of April, and afterwards, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Nathaniel G. Taylor, William T. Sherman, William S. Harney, John B. Sanborn, S. F. Tappan, C. C. Augur, and Alfred H. Terry, commissioners, on the part of the United States, and Ma-za-pon-kaska, Tah-shun-ka-co-qui-pah, Heh-won-ge-chat, Mah-to-non-pah, Little Chief, Makh-pi-ah-lu-tah, Co-cam-i-ya-ya, Con-te-pe-ta, Ma-wa-tau-ni-hav-ska, He-na-pin-wa-ni-ca, Wah-pah-shaw, and other chiefs and headmen of different tribes of Sioux Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

Articles of a treaty made and concluded by and between Lieutenant-General William T. Sherman, General William S. Harney, General Alfred H. Terry, General C. C. Augur, J. B. Henderson, Nathaniel G. Taylor, John B. Sanborn, and Samuel F. Tappan, duly appointed commissioners on the part of the United States, and the different bands of the Sioux Nation of Indians, by their chiefs and headmen, whose names are hereto subscribed, they being duly authorized to act in the premises.

ARTICLE I.

From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of

any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no one sustaining loss while violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

ARTICLE II.

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to

the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employés of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

ARTICLE III.

If it should appear from actual survey or other satisfactory examination of said tract of land that it contains less than one hundred and sixty acres of tillable land for each person who, at the time, may be authorized to reside on it under the provisions of this treaty, and a very considerable number of such persons shall be disposed to commence cultivating the soil as farmers, the United States agrees to set apart,

for the use of said Indians, as herein provided, such additional quantity of arable land, adjoining to said reservation, or as near to the same as it can be obtained, as may be required to provide the necessary amount.

ARTICLE IV.

The United States agrees, at its own proper expense, to construct at some place on the Missouri river, near the centre of said reservation, where timber and water may be convenient, the following buildings, to wit: a warehouse, a storeroom for the use of the agent in storing goods belonging to the Indians, to cost not less than twenty-five hundred dollars; an agency building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding five thousand dollars.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle machine attached to the same, to cost not exceeding eight thousand dollars.

ARTICLE V.

The United States agrees that the agent for said Indians shall in the future make his home at the agency building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

ARTICLE VI.

If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it,

[EXHIBIT 8]

**Monthly Cash Flow (Agri-Business)**

**Name:** Ron Long

**Year 1** **Date:** 11/96 to 10/97

| Month | 11 | 12 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cash, beginning: | | $9,313 | $6,363 | $3,413 | ($7,337) | ($10,287) | ($13,637) | ($25,247) | ($28,097) | ($28,447) | ($28,797) | ($40,595) | $0 |
| Grain | $12,125 | 96 wheat and millet | | | | | | | 200 @ 25 @ $4.00 | | $20,000 | | $32,125 |
| Int subsidy and CRP | | | | | | | | | | | | $44,198 | $66,198 |
| Calf sales 150 @ 80% @ $300 | | | | | | | | | | | | $36,000 | $36,000 |
| yearling sales 25 @ $550 | | | | | | | | | | | $13,750 | | $13,750 |
| pasture rent 200 head @ $13 5½ Mo | | | | | | | | $2,600 | $2,600 | $2,600 | $2,600 | $3,900 | $14,300 |
| **Cash available:** | **$34,125** | **$9,313** | **$6,363** | **$3,413** | **($7,337)** | **($10,287)** | **($13,637)** | **($22,647)** | **($25,497)** | **($25,847)** | **$7,553** | **$43,503** | **$162,373** |
| **Operating Expenses:** | | | | | | | | | | | | | |
| Car & Truck | | | | | | | | | | | | | $0 |
| Chemicals | | | | | | | | $2,500 | | | | | $2,500 |
| Conservation | | | | | | | | | | | | | $0 |
| Custom Hire (machine work) | | | | | | | | | | | | | $0 |
| Depreciation | | | | | | | | | | | | | $0 |
| Employee Benefits | | | | | | | | | | | | | $0 |
| Feed | | | | $2,500 | | | | | | | | | $2,500 |
| Fertilizers | | | | $3,000 | | | | | | | | | $3,000 |
| Freight & Trucking | | | | | | | | | | | | | $0 |
| Gasoline, Fuel & Oil | $700 | $700 | $700 | $700 | $700 | $1,100 | $1,700 | $700 | $700 | $700 | $1,700 | $2,700 | $12,800 |
| Insurance (other than health) | $1,000 | | | | | | | | | | | | $1,000 |
| Interest – other | | | | | | | | | | | | $1,710 | $1,710 |
| Labor hired | | | | | | | | | | | | | $0 |
| Pension & Profit-sharing | | | | | | | | | | | | | $0 |
| Rent or lease (Eqmt., etc.) | | | | | | | | | | | | | $0 |
| Rent or lease (Animals, Land) | $16,702 | | | | | | $3,000 | 6 @ $500 | | | | | $19,702 |
| Repairs & Maintenance | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $4,800 |
| Seeds and plants | | | | | | | $2,000 | | | | | | $2,000 |
| Storage and warehousing | | | | | | | | | | | | | $0 |
| Supplies | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $2,400 |
| Taxes | $2,660 | | | | | | $2,660 | | | | | | $5,320 |
| Utilities | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $4,200 |
| Veterinary, breeding & medicine | $1,500 | | | | | | | | | | | | $1,500 |
| Miscellaneous (specify) | | | | | | | | | | | | | $0 |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Total Cash Expenses:** | **$23,512** | **$1,650** | **$1,650** | **$7,150** | **$1,650** | **$2,050** | **$10,310** | **$4,150** | **$1,650** | **$1,650** | **$2,650** | **$5,360** | **$63,432** |
| | 1) BIA term note $415,000 20 yrs 9.25% $46,246 | | | | | | | | | | | | |
| **OTHER DISBURSEMENTS:** | 2) Land payment $44,198.00 | | | | | | | | | | | | |
| Capital expenditures | | | | | | | | | | | | | $0 |
| Livestock purchases | | | | | | | | | | | | | $0 |
| Owner's withdrawal | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $15,600 |
| Loan repayment | | | | $2,300 | | | | | | | $44,198 | $46,246 | $92,744 |
| **Total Other Disbursements:** | $1,300 | $1,300 | $1,300 | **$3,600** | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | **$45,498** | **$47,546** | **$108,344** |
| **Total Cash Disbursements:** | **$24,812** | **$2,950** | **$2,950** | **$10,750** | **$2,950** | **$3,350** | **$11,610** | **$5,450** | **$2,950** | **$2,950** | **$48,148** | **$52,906** | **$171,776** |
| **TOTAL CASH ENDING:** | **$9,313** | **$6,363** | **$3,413** | **($7,337)** | **($10,287)** | **($13,637)** | **($25,247)** | **($28,097)** | **($28,447)** | **($28,797)** | **($40,595)** | **($9,403)** | **($9,403)** |

and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it, by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Sioux Land Book."

The President may, at any time, order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper. And it is further stipulated that any male Indians over eighteen years of age, of any band or tribe that is or shall hereafter become a party to this treaty, who now is or who shall hereafter become a resident or occupant of any reservation or

territory not included in the tract of country designated and described in this treaty for the permanent home of the Indians, which is not mineral land, nor reserved by the United States for special purposes other than Indian occupation, and who shall have made improvements thereon of the value of two hundred dollars or more, and continuously occupied the same as a homestead for the term of three years, shall be entitled to receive from the United States a patent for one hundred and sixty acres of land including his said improvements, the same to be in the form of the legal subdivisions of the surveys of the public lands. Upon application in writing, sustained by the proof of two disinterested witnesses, made to the register of the local land office when the land sought to be entered is within a land district, and when the tract sought to be entered is not in any land district, then upon said application and proof being made to the commissioner of the general land office. and the right of such Indian or Indians to enter such tract or tracts of land shall accrue and be perfect from the date of his first improvements thereon, and shall continue as long as he continues his residence and improvements, and no longer. And any Indian or Indians receiving a patent for land under the foregoing provisions, shall thereby and from thenceforth become and be a citizen of the United States, and be entitled to all the privileges and immunities of such citizens, and shall, at the same time, retain all his rights to benefits accruing to Indians under this treaty.

ARTICLE VII.

In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years.

ARTICLE VIII.

When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds

and implements as aforesaid, not exceeding in value twenty-five dollars.

And it is further stipulated that such persons as commence farming shall receive instruction from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be needed.

ARTICLE IX.

At any time after ten years from the making of this treaty, the United States shall have the privilege of withdrawing the physician, farmer, blacksmith, carpenter, engineer, and miller herein provided for, but in case of such withdrawal, an additional sum thereafter of ten thousand dollars per annum shall be devoted to the education of said Indians, and the Commissioner of Indian Affairs shall, upon careful inquiry into their condition, make such rules and regulations for the expenditure of said sum as will best promote the educational and moral improvement of said tribes.

ARTICLE X.

In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house

on the reservation herein named, on [or before[1]] the first day of August of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, pantaloons, flannel shirt, hat, and a pair of home-made socks.

For each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the clothing herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of thirty years, while such persons roam and hunt, and twenty dollars for each

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[1] The words "or before" are inserted with black pencil.

person who engages in farming, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if within the thirty years, at any time, it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the Indians named herein, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery. And it is hereby expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians or family of persons legally incorporated with them, who shall remove to the reservation herein described and commence farming, one good American cow, and one good well-broken pair of American oxen within sixty days after such lodge or family shall have so settled upon said reservation.

ARTICLE XI.

In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase. And they, the said Indians, further expressly agree:

1st. That they will withdraw all opposition to the construction of the railroads now being built on the plains.

2d. That they will permit the peaceful construction of any railroad not passing over their reservation as herein defined.

3d. That they will not attack any persons at home, or travelling, nor molest or disturb any wagon trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. They will never capture, or carry off from the settlements, white women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They withdraw all pretence of opposition to the construction of the railroad now being built along the Platte river and westward to the Pacific ocean, and they will not in future object to the construction of railroads, wagon roads, mail stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or headman of the tribe.

7th. They agree to withdraw all opposition to the military posts or roads now established south of the North Platte river, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE XII.

No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of

land selected by him, as provided in Article VI. of this treaty.

ARTICLE XIII.

The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE XIV.

It is agreed that the sum of five hundred dollars annually, for three years from date, shall be expended in presents to the ten persons of said tribe who in the judgment of the agent may grow the most valuable crops for the respective year.

ARTICLE XV.

The Indians herein named agree that when the agency house and other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article XI. hereof.

ARTICLE XVI.

The United States hereby agrees and stipulates that the country north of the North Platte river and east of the summits of the Big Horn mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians, first had and obtained, to pass through the same; and it is further agreed by the United States, that within ninety days after the conclusion of peace with all the bands of the Sioux nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed.

ARTICLE XVII.

It is hereby expressly understood and agreed by and between the respective parties to this treaty that the execution of this treaty and its ratification by the United States Senate shall have the effect, and shall be construed as abrogating and annulling all treaties and agreements heretofore entered into between the respective parties hereto, so far as such treaties and agreements obligate the United States to furnish and provide money, clothing, or other articles of property to such Indians and bands of Indians as become parties to this treaty, but no further.

In testimony of all which, we, the said commissioners, and we, the chiefs and headmen of the Brulé band of the Sioux nation, have hereunto set our hands and seals at Fort Laramie, Dakota Territory, this twenty-ninth day of April, in the year one thousand eight hundred and sixty-eight.

# PETITIONER'S BRIEF

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# In The Supreme Court of the United States

PLAINS COMMERCE BANK,

*Petitioner,*

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG, LILA LONG,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITIONER PLAINS COMMERCE BANK'S BRIEF


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## QUESTION PRESENTED

Whether Indian tribal courts have subject-matter jurisdiction to adjudicate civil tort claims as an "other means" of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member-owned corporation?

## LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eighth Circuit.

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or publicly held company owning 10% or more of its stock.

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## OPINIONS BELOW

The June 26, 2007 Opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 491 F.3d 878 (8th Cir. 2007), and is reprinted in the Appendix to the Petition For Writ of Certiorari, pp. A-1 through A-23. The prior opinion of the United States District Court for the District of South Dakota, entered July 17, 2006, is reported at *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 440 F. Supp. 2d 1070 (D.S.D. 2006), and is reprinted in the Appendix to the Petition For Writ of Certiorari, pp. A-24 through A-44.

The prior decision of the Cheyenne River Sioux Tribal Court of Appeals, case number 03-002-A, entered November 22, 2004, is unreported, and is reprinted in the Appendix to the Petition For Writ of Certiorari, pp. A-45 through A-68. The prior decisions of the Cheyenne River Sioux Tribal Court, case number R-120-99, entered February 18, 2003, and January 3, 2003, respectively, are unreported, and are reprinted in the Appendix to the Petition For Writ of Certiorari, pp. A-69 through A-71, and pp. A-72 through A-83.

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## JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The

Petition for Writ of Certiorari was filed on September 21, 2007, and granted on January 4, 2008.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal courts have jurisdiction to review tribal-court jurisdiction pursuant to 28 U.S.C. § 1331, which provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

*See Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985).

## STATEMENT OF THE CASE

This case arises out of a dispute concerning non-Indian-owned land located within the boundaries of an Indian reservation in South Dakota. The practical problem presented by the Eighth Circuit's opinion is that nonmembers doing business with tribal members can be swept into tribal courts as defendants, triggering all of the unknowns this entails. Neither a nonmember's ownership of land on an Indian reservation, nor contracting with a member-owned South Dakota corporation, is sufficient to subject a nonmember to tribal-court adjudication of tribal, common-law tort

claims. Indian tribes' assertion of adjudicative authority over nonmembers is inconsistent with their diminished status as dependent domestic sovereigns. Their retained, inherent sovereignty generally does not extend to nonmembers.

## A. The Cheyenne River Sioux Reservation

Although at one time the Sioux Tribe claimed a large part of the Great Plains as its own, wars, treaties, Congressional divestiture, land allotments, and sales have significantly diminished the Sioux Tribe's land. *South Dakota v. Bourland*, 508 U.S. 679, 682 (1993); and *Solem v. Bartlett*, 465 U.S. 463, 468-69 (1984). The Fort Laramie Treaty of 1868 established the now defunct Great Sioux Reservation, consisting of more than 60 million acres, principally in western South Dakota and south-western North Dakota. Treaty With The Sioux Indians, Art. II, April 29, 1868, 15 Stat. 638 (1868), Joint Appendix ("JA") 205-22. The Indian General Allotment Act of 1887, however, provided for diminishment of this reservation by enabling non-Indians to acquire fee title to unallotted and "surplus" land on the reservation. Indian General Allotment Act of 1887, 24 Stat. 388 (1887). In 1889, Congress replaced the Great Sioux Reservation with a number of smaller reservations, which included the Cheyenne River Sioux Reservation ("Reservation"). *Bourland*, 508 U.S. at 682.

The boundaries of the Reservation encompass almost all of Dewey and Ziebach counties in north-central South Dakota. Further sales and transfers of individually and tribally owned lands within the Reservation occurred when Congress later opened up 1.6 million acres of land within Reservation boundaries for homesteading by non-Indians. Act of May 29, 1908, 35 Stat. 460 (1908). Today, non-Indians own substantial land within Reservation boundaries, including the land at issue in this case.

## B. The Parties

Plains Commerce Bank ("the Bank"), formerly known as Bank of Hoven, is a South Dakota banking corporation. Aff. Charles Simon ("Simon Aff.") at ¶ 2 (D.S.D. Dec. 1, 2005) (Dkt. No. 32). During the events at issue in this lawsuit, its main place of business was located in Hoven, South Dakota. *Id.* The Bank is not on the Reservation, and is not owned by tribal members. *Id.*

The Long Family Land and Cattle Company ("the Long Company") is a South Dakota ranching and farming corporation, located on the Reservation. The Long Company was incorporated by filing Articles of Incorporation with the State of South Dakota on March 24, 1987. *Id.*; *see also* JA 13-20. Shortly thereafter, the Indian-owned Long Company, which was eligible for Bureau of Indian Affairs ("BIA") guaranteed loans pursuant to 25 C.F.R. § 103.25 (2001), began lending relations with the Bank. Simon Aff. at

¶¶ 3-4. Cheyenne River Sioux tribal members Ronnie Long and his wife, Lila Long ("the Longs") have a majority shareholder interest in the Long Company. *Id.* at ¶ 3.

### C. The Land

The primary collateral underlying the loan arrangements between the Bank and the Long Company consisted of approximately 2,230 acres of pasture and farm land on the Reservation in Dewey County, South Dakota, and a home in Timber Lake, South Dakota. *Id.* at ¶ 4. Kenneth Long, Ronnie Long's father, and a non-tribal member, owned this property in fee status before his death. *Id.* In 1992, Kenneth Long mortgaged this property to the Bank as security for the Long Company's debt. Aff. Ronnie and Lila Long, Ex. 7 (D.S.D. Dec. 9, 2005) (Dkt. No. 38); *see also* JA 31-33, 42-46. At no time did the Long Company, or Ronnie or Lila Long own the relevant property. Second Aff. of Charles Simon ("Second Simon Aff.") at ¶ 3 (D.S.D. Dec. 22, 2005) (Dkt. No. 45).

Kenneth Long died on July 17, 1995. Simon Aff. at 5; *see also* JA 86-88. On September 26, 1995, the Bank filed in Dewey County, South Dakota, a Statement of Claim against the estate for Long Company debts totaling approximately $687,000. Simon Aff. at ¶ 5, Ex. 2. In lieu of foreclosure, Kenneth Long's second wife, Pauline Long, provided a

neglect of the issue at the trial, then twists it (somehow) to contend that the very existence of a discrimination cause of action was playing the 'race card.' The Bank's apparent 'solution' to this 'problem' is that claims of discrimination against non-resident Banks should not exist as a matter of tribal law. This asserts a rather extravagant privilege for the Bank that is presumably not available to others, especially tribal members and the Tribe itself. Whether intended or not, this *is* the Bank playing its own 'race card', which at a minimum is quite baffling and potentially quite disturbing in the context of seeking to maintain a fair and reasonable legal context for the necessary commercial transactions involving individual Tribal ranchers and business people and the banking establishment. Both Tribal members and the Bank need each other and it is quite disheartening to have the Bank interject the potentially destabilizing 'race card' into these proceedings.

5. Eviction

The trial court dismissed the Bank's counterclaim for forcible entry and detainer against the Longs. The counterclaim was not tried to the jury as neither party requested it. The trial court rendered its decision after the jury verdict. It reasoned that based on its own previous decision that the loan agreement and the lease with option to purchase formed an integrated document and the jury's verdict that the Bank breached the contract, it could not render a favorable decision to the Bank on its counterclaim for eviction. The court's reasoning was that the jury finding that the Bank breached the contract (including the lease) effectively precluded any finding that Longs had breached the lease or otherwise improperly held over and were subject to eviction.

In addition, the Bank made no attempt to comply with the Tribal Law and Order Code provisions for recovering the possession of real properly set out §§ 10-2-1 – 10-2-8. § 10-2-

6(6) specifically provides that when a tenant has held over for more than sixty days without any notice to quit by the landlord, the tenant shall have the right to remain in possession for a full year after the lease termination date. The lease between the Bank and the Longs ran from December 5, 1996 to December 6, 1998. The Longs held over but no notice to quit was served within the sixty days (i.e. February 5, 1999) and thus the Longs had the right to hold over to December 6, 1999. Indeed, the notice to quit was not served on the Longs until June 16, 1999. (Exhibit 20). The notice to quit described the Longs as still in possession of the entire 2,230 acres. Despite the fact that the Longs were legally in possession of this land as a matter of express tribal law during this period, the Bank *sold* the land to two different purchasers in violation of the Longs' right to hold over and exercise their option to purchase under the original lease. (Exhibit 20). At no time did the Bank ever get an order from the tribal court removing the Longs from the land (TR 370).

6. Option to Purchase

The trial court granted partial relief to the Longs on this issue when it ruled that the Longs would be permitted to exercise their option to purchase the 960 acres they were currently occupying but not the 960 acres that were sold to the Maciejewskis and the 320 acres sold to the Pesickas. The Bank asserts that the trial court in essence ordered (partial) specific performance be granted against the Bank, but that such a remedy was never sought by the Longs and that such a remedy is equitable in nature and not available in a breach of contract action which is 'action at law' that does not authorize equitable relief. These statements constitute legal observations of a quite general kind and are not part of the positive law of the Cheyenne River Sioux Tribe.

In the instant case, the trial court attempted to strike a

balance between law and equity and to secure fairness to both sides. The specific performance element involving the option to purchase involved land originally owned by the lessee and lost because of tire inability to pay a significant debt to the Bank. The fact that the Longs were seeking to (re)purchase land that had been in their family for generations lakes the case outside the realm of the formal law/equity distinction. In addition, Judge Jones was careful not to interfere with the property rights of the Maciejewskis and the Pesickas as good faith purchasers. The balance struck by the trial court is fair, reasonable, and violated no rule of Cheyenne River Sioux Tribal law.

7. Pre-Judgment interest

The Bank objects to the award of pre-judgment interest.[6] Its essential argument – drawn primarily from South Dakota and California Law – is that prejudgment interest should only be awarded if the defendant knows or should have known based on reasonably accessible information what the amount owed was. This general observation however does not require a different result. It is routine in the West – including South Dakota – to calculate pre-judgment interest on lost cattle based on their market value at the time of the loss. Deciding the date of loss – if contested – is a factual question to be resolved by the jury. Thus the method of awarding prejudgment interest in this case conforms to the general practice throughout Western parts of the United States.

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[6] Pre-judgment interest is neither directly authorized nor prohibited by the Tribal Code. This might be an area where direct legislative guidance by the Cheyenne River Sioux Tribal Council would be beneficial, especially as to the rate of interest and the means of calculation of such interest.

The Bank's claim is further undermined by the fact that it did not object to special jury interrogatory 6 or jury instruction 10a on the issue of the potential award of interest and it did not propose any special jury interrogatories of its own. Such failure ordinarily precludes raising the issue on appeal. See e.g. *Alvine v. Mercedes-Benz of North America*, 620 N.W.2d 608 (SD 2001). In addition, the trial court adopted and accepted (to the penny) the Bank's proposed interest of $123,131.81 as opposed to the Plaintiffs' proposal of $453,698.

B. Plaintiffs/Respondents/Appellants Issues on Appeal

The Plaintiff Longs raise two issues on appeal and they are the mirror images of the Bank's issues numbers six and seven, namely that trial court erred in *not* awarding Plaintiffs complete specific performance to (re)purchase *all* the land involved in the original lease and option to purchase and the trial court erred in its calculation of pre-judgment interest to be awarded. Each issue will be discussed in turn.

1. Option to Purchase

The Longs contend that the trial court erred in its failure to permit the Longs to exercise its option to purchase all of their 2,225 acres rather than just 960 acres on which they effectively heldover. The Bank had already sold 320 acres to Pesickas and 960 acres to Maciejewskis and Judge Jones decided the option to purchase would *not* apply to these parcels.

In Judge Jones' supplemental judgment of February 18, 2003, he expressly stated:

> The court first notes that the tribal jury returned a verdict for the Bank and against the Plaintiffs on

> the Plaintiffs' claim that the Bank violated tribal law against self-help remedies when it sold certain parcels of the land the Plaintiffs had an option to purchase. The Court construes this to mean that the jury found that the sale of the land to the other parties was not done in violation of tribal law and the other defendants [i.e. the Pesickas and Maciejewskis] were good faith purchasers.

Counsel for the Longs does not state what the appropriate standard of review is and more directly, why this legal determination of Judge Jones is wrong as a matter of tribal law.[7] Under these circumstances, Judge Jones' decision violated no rule of tribal law and balanced the equities in a most reasonable and fair manner.

2. Pre-Judgment Interest

The Longs contend that while the trial court was correct in submitting the question of whether to award pre judgment interest to the jury (which answered in the affirmative), the trial judge erred in his calculations of the amount of pre-judgment interest to be awarded. The core of the Longs claim on this issue is that the trial judge should have adopted the South Dakota statute, SDCL 21-1-13.1, which sets a rate of 10% for pre-judgment interest. Working from this assertion, plaintiffs' counsel does what he regards as the necessary mathematical calculations and arrives at the figure of $453,698 (Respondents-Appellants brief at 9).

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[7] The discussion of Cheyenne River Sioux Tribe Law and Order Code Sec. 10-1-5 is inappropriate as it deals with the proposed sale of foreclosed property which is not involved in this lawsuit.

There are several shortcomings in this line of argument. Counsel for the Longs does not identify what the appropriate standard of review is and whether the trial judge's mistake was one of law and/or fact, There can be no mistake of law because there is no express rate of interest specified in Me tribal code and therefore any (reasonable) rate of pre-judgment interest would he an appropriate legal standard.[8] Judge Jones required that counsel for both parties submit proposals to him. Then Judge Jones accepted the Bank's proposal of pre-judgment interest in the amount of $123,131.81 based on a rate of 8.5%, the rate of interest identified in the lease with option to purchase to be charged the Longs if they exercised their option to purchase.

In addition to different rates of interest, the proposals of both parties used slightly different mathematical models of calculation based on the varying assessments as to the time of loss, value at the time of loss, and whether interest would be simple or compound. While these differences in approach lead to quite different final calculations, there is no demonstration by the Longs that these figures are clearly erroneous or arbitrary and capricious and therefore the amount of pre-judgment interest awarded by Judge Jones is affirmed.

Unfortunately, a final concern must be addressed. In his concluding summation to this Court, counsel for the Bank stated that a lot of banks and lenders were watching this case. While it seemed jarring and inappropriate at the time, it is even more so upon reflection. It is difficult to see the statement as merely some form of artless advocacy, but rather

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[8] As noted above in footnote 6, *supra* at p. 16, the issue of pre-judgment interest including the specific rate of interest and method of calculation would greatly benefit form specific statutory guidance provided by the Cheyenne River Sioux Tribal Council.

more as some kind of threat impugning the integrity of the Cheyenne River Sioux Tribe's judicial system, which this Court finds most offensive and unprofessional. Such statements must not be made again. Though it hardly needs repeating, the Court restates its commitment to fair play, the rule of law, and cultural respect for *all* parties who appear in the courts of the Cheyenne River Sioux Tribe.

IV. Conclusion

For all the reasons above stated, the decision of the trial court is affirmed on all issues.

Ho Hec'etu Ye Lo

IT IS SO ORDERED.

FOR THIS COURT:
s/
Frank Pommersheim
Chief Justice

Dated November 22, 2004.

CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER SIOU INDIAN RESERVATION

IN CIVIL COURT
IN GENERAL SESSION
R-120-99

LONG FAMILY LAND AND CATTLE COMPANY- RONNIE AND LILA LONG,
Plaintiffs,

vs.

SUPPLEMENTAL JUDGMENT

EDWARD AND MARY MACIEJEWSKI,
RALPH AND NORMA J. PSICKA,
And THE BANK OF HOVEN, nka PLAINS COMMERCE BANK,
Defendants.

This Court entered its judgment in this matter awarding the amount of principal awarded by the jury plus interest, as directed by the jury, and costs and disbursements. This supplemental judgment will address the Plaintiff's request to exercise its option to purchase all of the land conveyed by administrator's deed from the estate of Kenneth Long to the Bank of Hoven, including the land purchased by the Pesickas and Maciejewskis from the Bank. The Bank opposes the motion with regard to the land that was conveyed to the other parties, and also with regard to the land the Plaintiffs presently occupy.

The Court first notes that the tribal jury returned a verdict for the Bank and against the Plaintiffs on the Plaintiffs' claim that the Bank violated tribal law against self-help remedies when it sold certain parcels of the land the Plaintiffs had an option to purchase. The Court construes this to mean that the jury found that the sale of the land to the other parties was not done in violation of tribal law and

therefore the other Defendants were good faith purchasers of the land.

The Plaintiffs contend that the jury's verdict coupled with this Court's denial of the Defendant Bank's counterclaim for eviction, due to the jury's finding that the Bank's breach of the loan agreement prevented them from exercising their option to purchase, preserves them the option to purchase the land including the land that was sold to the other Defendants after the Bank determined that the Plaintiffs' option to purchase had expired. Were it not for the intervening purchases, the Court may well be inclined to agree with the Plaintiffs. However, the Court does not feel it has the authority to set aside the contracts for deed the Bank entered into with the other Defendants if those Defendants entered into those contracts in good faith and without knowledge of the existing legal dispute between the Bank and the Plaintiffs. Additionally, the only legal issue presented by the counterclaim was whether the Court should evict the Plaintiffs from the 960 acres they presently occupy. The jury ruled against the Plaintiffs on their theory that the conveyances to the other Defendants violated the law.

In light of this, the Court finds that the Plaintiffs continue to possess an option to purchase the 960 acres they presently occupy at the amount per acre contemplated in the original option, but that they do not have a right to purchase the lands sold the other Defendants. The Court rejects the Bank's argument that enforcing the original option to purchase would be inequitable because land values have gone up because the Plaintiffs were denied the right to exercise the option because of the Defendant Bank's breach. The Court also finds that under the original agreement the proceeds from the sale of the house as well as the CRP payments were to be applied to the purchase price for the entire parcel. However, those amounts were pled in the request for the monetary

judgment arid a further reduction here would result in the Plaintiff achieving a double recovery.

WHEREFORE, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Plaintiffs are entitled to exercise the option to purchase the 960 acres they presently occupy in the amount of $201,600 and said amount shall be reduced from the judgment entered on their behalf against the Defendant Bank. The Plaintiffs shall file a partial satisfaction of judgment in that amount and the Bank shall, within 30 days of that filing, convey a quit claim deed to the Plaintiffs for the 960 acres they presently occupy, and it is further

ORDERED, ADJUDGED, AND DECREED that the Plaintiffs' request to exercise the option on the remaining balance of land referenced in the option to purchase is DENIED.

So adjudged this 18th day of February 2003.

s/_____
B.J. Jones
Special Judge

ATTEST: s/_____
Clerk of Courts

CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER SIOU INDIAN RESERVATION

IN CIVIL COURT
IN GENERAL SESSION
R-120-99

LONG FAMILY LAND AND CATTLE COMPANY- RONNIE AND LILA LONG,
Plaintiffs,

vs. ORDER

EDWARD AND MARY MACIEJEWSKI,
RALPH AND NORMA J. PSICKA,
And THE BANK OF HOVEN, nka PLAINS COMMERCE BANK,
Defendants.

The Defendant Bank has moved this Court for judgment notwithstanding the verdict, or in the alternative a new trial, on several causes of action asserted in the Plaintiffs' complaint and tried to a seven-member jury[1] on December 6 and 11, 2002. This Court dismissed several counts of the complaint, including one for fraud, one for failure of consideration, one pleading an unconscionable contract, and one praying for rescission of contract, after submission of the Plaintiffs' case, but permitted four counts-breach of contract, bad faith, discrimination, and violation of self-help remedies-to be submitted to the jury.[2] The Defendant's counterclaim for

[1] Although the Court impaneled six jurors and one alternate in this case, the Parties during the trial stipulated that all seven jurors could deliberate the case.

[2] The Court also dismissed, prior to trial, the count of the complaint (alleging fraud in the inducement of a personal representative's deed from the estate of Kenneth L. Long to

unlawful entry and detainer was heard by the Court at the same time as the legal issues were tried to the jury. The jury returned its verdict in the form of six interrogatories finding for the Plaintiffs on the causes of action alleging breach of contract, bad faith, and discrimination and finding for the Defendants on the count alleging violation of self-help remedies. The jury also issued an advisory verdict on the issue of whether the Defendant Bank's breach of contract prevented the Plaintiffs from performing on a lease with an option to purchase, finding that it did. That verdict informs the Court with regard to the counterclaim of the Bank to evict the Plaintiffs from certain real property it had acquired title to in the probate proceedings of Kenneth L. Long. The jury also returned a verdict for damages in the amount of $750,000 and directed the Court to award interest on that amount. The Defendant Bank timely filed its motion for JNOV and for a new trial on all counts the jury returned against it. This order will also address the Defendant Bank's counterclaim seeking to evict the Plaintiffs from certain fee lands within the Cheyenne River reservation.

The Defendant Bank's first argument is that the finding that it breached a loan agreement (Plaintiff's Exhibit 6) is legally insufficient because the loan agreement is not a legally-enforceable contract because the Defendants failed to give consideration. Although this defense was not pled by the Defendant Bank prior to trial, it did make an oral motion to conform its pleadings to the evidence submitted and that motion was granted by the Court. The Defendant Bank also moved for a directed verdict on the issue and the motion is therefore appropriate. The issue of want of consideration was therefore appropriately submitted to the jury and is therefore

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the Bank prior to trial on the ground that this count was an attempt to collaterally attack state court probate proceedings and should have been brought in the state court.

now resolvable by the Court.

In general, a Court should not overturn the verdict of a jury if sufficient evidence was submitted to the jury so that reasonable minds could disagree about the evidence. See Dunes Hospitality v. Country Kitchen, 623 NW2d 484 (SD 2001). As the South Dakota Supreme Court has stated with regard to judgments nov:

> Thus, the grounds asserted in support of the directed verdict motion are brought before the trial court for a second review. We review the testimony and evidence in a light most favorable to the verdict or the nonmoving party, "then without weighing the evidence [we] must decide if there is evidence which would have supported or did support a verdict.

Matter of Estate of Holan, 621 NW2d 588, 591 (SD 2000).

BREACH OF CONTRACT ACTION

The Bank makes a strong argument that the loan agreement that the jury found it breached is non-enforceable because of a lack of consideration by the Plaintiffs. If a contract is lacking in consideration, a party not giving consideration cannot recover for a breach of that contract. At first blush, it is difficult to see what consideration the Plaintiffs gave in exchange for the promises made by the Bank in the loan agreement, Trial Exhibit 6. The Bank had received a personal representative's deed to the land owned by Kenneth Long that secured the loans to Long Family Land and Cattle Company. The Plaintiffs owed the Bank the amounts reflected in the loan agreement and the agreement appears to be a method for the Bank to re-amortize the payments on the outstanding owed the Bank by the

Defendants. Admittedly, the Bank was attempting to gain an increased guarantee from the BIA and needed the Longs cooperation in seeking this, but that "consideration" is not anything the Longs were giving up.

However, the Longs still occupied the land and were receiving the CRP payments on the land. It is impossible to gauge whether valid consideration was given by the Plaintiffs for the loan agreement without also viewing the lease with the option to purchase, which the Court has already ruled, in denying the Defendant's motion for summary judgment on its counterclaim for eviction, was a related document under the integrated document doctrine. See Battery Steamship Corp. v. Refineria Panama S.A., 513 F.2d 735, 738 n.3 (2d Cir. 1975). It is possible that the jury found consideration in the fact that the Longs were agreeing to continue the operation of their cattle ranch in order to pay the entire amount of principal plus interest instead of having the Bank call the loans and collect the guarantee from the BIA in an amount substantially less than what was owed by the Plaintiffs. In addition, the Longs agreed to assign the CRP payments to the Bank as part of the plan to permit them to get on their feet again and attempt to regain title to the land that was in the Long family name for many years. The Court cannot conclude that there is no evidence that supports the jury's verdict and therefore denies the motion for judgment notwithstanding the verdict on the claim that consideration was wanting.

The Bank also contends that even if consideration existed, no evidence was submitted to the jury to support the Plaintiffs' claim that the Bank breached the loan agreement. The Bank contends that by the time it was required to perform under the loan agreement- late winter of 1997- the Plaintiffs had suffered substantial livestock losses due to the catastrophic winter of 96-97 and could not have possibly met the loan payments under the loan agreement. The Bank also contends that the only thing it promised to do in the loan

agreement was to seek an increase in the BIA guarantee, which it did and the BIA delayed action on the request, and the advance of operating monies of $70,000 was contingent upon the increased guarantee by the BIA which never came.

The Plaintiffs' theory at trial was that the guarantee of $70,000 in annual operating loans was breached and that the advances were not contingent upon the increase by the BIA in the guarantee. The Plaintiffs advanced the theory that had the Bank advanced the $70,000 in operating costs to it they would not have had the catastrophic cattle losses they experienced because they would have gotten feed to their livestock.[3] It was undisputed that the Bank did not advance the $70,000 referred to in the loan agreement and the Court believes the issue of whether that advance was contingent upon the increase in the BIA guarantee is not clear from the face of the loan agreement and was therefore a jury issue. The jury apparently felt that the Bank breached the promise to advance the operating costs and this Court cannot substitute its opinion for that of the jury when evidence does exist to support the verdict. The loan agreement is ambiguous on its face on the issue of whether the annual advance of the $70,000 in operating monies was contingent upon the BIA improving the increase in the guarantee and that ambiguity must be construed against the drafter of the document- in this case, the Bank.

The Bank also seems to be contending in its motion that it should have been excused from performing the loan agreement after the winter of 96-97 because the catastrophic livestock losses suffered by the Longs precluded them from

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[3] There was conflicting testimony whether the Longs had ever asked the Bank for operating monies to move hay to the livestock or to move the livestock, but this was a jury issue that was apparently resolved against the Bank.

paying the notes that were consolidated into the loan agreement. This is a legal issue that the Bank did not ask for a jury instruction on and was not therefore properly preserved at trial. Even had it been proposed as a defense, however, the success of this defense would depend upon the jury accepting the premise that the Bank had complied with the loan agreement up to the point when the Longs lost their livestock. The Plaintiffs' theory of the case appeared to be that the operating loan, had it been made prior to the cattle losses, would have prevented those losses and this was a question of fact for the jury to resolve.

## BAD FAITH CAUSE OF ACTION

The jury also returned a verdict finding that the Bank acted in bad faith when it attempted to gain the increase in the guarantee from the BIA. The Bank contends that there is no evidence to support this conclusion and the verdict should therefore be set aside. Although there is evidence from the record that the BIA was somewhat derelict in delaying a decision on the guarantee until after the Longs had suffered substantial cattle losses,[4] the undisputed evidence presented to the jury was that the Bank failed to respond to a request from the BIA to correct the submission for the increased guarantee in accordance with federal regulations attached to the letter notifying the Bank and the Longs of the insufficient application. The Bank decided not to respond to the request because it apparently had concluded that with the Longs' cattle losses the Longs were no longer able to make the

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[4] The BIA took almost two months before it denied the Bank's request for an increase in the BIA guarantee because it was not appropriately submitted. The record is not clear regarding who submitted the documentation for the increase- the Bank or the Cheyenne River Sioux Tribe's Finance Office- but it is clear in that the Bank did not respond to the increase for a correct application.

payments on the loan agreement. Admittedly, the Bank did proceed to loan more monies to the Longs and to re-amortize additional loans. However, the jury must have decided that this was not a substitute for the $70,000 in operating monies the Longs needed in order to survive the winter of 96-97.

The Bank argues that the bad faith claim is subsumed into the cause of action alleging breach of contract and a separate cause of action should not have been tried to the jury on this issue. The Court believes that the bad faith claim relates to the failure of the Bank to follow through with the promise to seek an increase in the BIA guarantee, while the breach of contract action relates to the failure of the Bank to make the operating loans as promised in the loan agreement. These are discrete claims and both impacted the ultimate inability of the Longs to purchase back the land of Kenneth Long under the lease with an option to purchase.

## DISCRIMINATION

The third verdict returned against the Defendant Bank related to the claim of the Longs for discrimination in the lending practices of the Bank. During the trial a document was admitted into evidence, without objection, wherein the Vice-President of the Bank advised the Longs that the Bank would not sell them the land they obtained from the personal representative of the estate of Kenneth Long by contract for deed because of the "jurisdictional problems if the Bank ever had to foreclose on this land when it is contracted or leased to an Indian owned entity on the reservation." (Pl's Exhibit 4). This letter was dispatched after the Parties had apparently reached an understanding that the Bank would resale the Longs the land on a contract for deed. The Bank then proceeded to sell a parcel of the land to the Maciejewskis, non-Indians, on a contract for deed. The Court determined that his was prima facie evidence that the Bank denied the

Longs the privilege of contracting for a deed because of their status as tribal members and thus submitted the count to the jury for determination over the objection of the Bank, which timely made a motion for a direct verdict on that issue and objected to the jury instruction and interrogatory on the issue.

The Bank reiterates its argument that this Court has no jurisdiction over a claim of discrimination arising under federal law against a non-Indian entity. Federal law prohibits any entity that receives the benefit of federal financial assistance from discriminating against any person in the delivery of services. See 42 U.S.C. 2000d. This statute has been held to prevent a bank from "redlining" a certain area because of the racial composition of the residents of that area. See Laufman v. Oakley Bldg and Loan, 408 F.Supp 489 (SD Ohio 1976). The Longs are Indian residents of the Cheyenne River Sioux Indian reservation who claimed that the Bank denied them a privilege of contracting for a deed that was granted non-Indians.[5] There was uncontroverted evidence during the trial that the Bank was receiving the benefit of Department of Interior guarantees and CRP payments under federal programs and thus the Bank appears to be covered by federal law.

The Bank contends, however, that even if a prima facie case of discrimination was demonstrated, this Court lacks the jurisdiction to enforce federal civil rights laws under

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[5] In denying the Bank's motion for a directed verdict on this issue, the Court stated that it did not feel that the mere denial of the contract for deed to the Longs was conclusive evidence of discrimination and thus instructed the jury that it must find that the Bank's decision to deny the contract for deed was based "solely" upon their status as tribal members, thus permitting the jury to return a verdict for the Bank if it determined that the Bank had other non-discriminatory reasons to deny the contract for deed.

Nevada v. Hicks, 150 L.Ed. 2d 398, 121 S.Ct. 2304 (2001). In Hicks the Supreme Court held that a tribal court lacks the authority to hear claims against state officials or those acting under the color of state law who allegedly violate the rights preserved persons under federal law under the provisions of 42 USC 1983. The Defendants argue that the same logic applies to claims brought against private parties for violations of other federal laws protecting the rights of individuals to be free of discrimination.

The Court disagrees with the Bank's argument that this Court lacks the jurisdiction to enforce federal anti-discrimination laws against non-Indian entities over which the Court clearly has jurisdiction under the principles laid out in Nevada v. Hicks. It is undisputed in this case, and was conceded by the Bank, that the Bank had a consensual commercial relationship with the Longs, enrolled members of the Cheyenne River Sioux Tribe, and their family cattle corporation, an Indian-owned entity. Even under the very proscribed view of tribal court jurisdiction over non-Indians contained in Hicks, this Court has jurisdiction over a non-Indian Bank that enters into a consensual relationship with the Band or its member or whose actions "threaten or ha(ve) some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." Montana v. United States, 450 U.S. 544, at 566 (1981); see also Gesinger v. Gesinger, 531 N.W.2d 17 (SD 1995). In Hicks the Supreme Court found that the tribal court jurisdiction over the game warden there was wanting because he had no consensual relationship with the Tribe or its members and his actions did not meet the second prong of the Montana test.

The Court notes that the Cheyenne River Sioux Tribal Code directs this Court to apply federal law in the absence of applicable tribal law. The only anti-discrimination laws explicitly contained in the Cheyenne River Sioux Tribal Code

and Constitution are those prohibiting the Tribe from discriminating or denying equal protection of the laws to persons. The Tribe does not appear to have specific code provisions prohibiting private discrimination and the court is therefore instructed to look to relevant federal law. The Court does not believe that Hicks precludes a tribal court from exercising jurisdiction over a claim of discrimination, ultimately founded upon federal law, against a party over which the Court can exercise jurisdiction under Hicks and Montana. 42 U.S.C. 1983 is not a basis for substantive law, but merely a procedural vehicle for a federal court to exercise jurisdiction over claims of violations of federal law that fund their source in other federal laws. If this Court were precluded under Hicks from enforcing all federal civil rights laws, it would be stripped of the authority to enforce the Indian Civil Rights Act, notwithstanding the United States Supreme Court's pronouncement in Santa Clara Pueblo v. Martinez, , 436 U.S. 49, 58 (1978) that it has ultimate authority to enforce that law. Merely because the genesis of a right arises under federal law does not preclude this Court from enforcing that right.

## REDUCTION OF DAMAGES

The Bank argues that the verdict returned by the jury was excessive and had no basis in the law. The Court disagrees. The verdict returned was approximately $500,000 less than what was claimed by the Longs as their damages. Based upon the special interrogatory answers and the exhibits submitted, including Plaintiff's Exhibit 23, the Court cannot conclude that there was no basis for the amount of damages awarded by the jury and therefore denies the motion to reduce the amount of damages awarded.

## COUNTERCLAIM FOR EVICTION

In light of the jury's verdict that the Bank did breach

the loan agreement, and this Court's previous finding that the lease with an option to purchase and loan agreement were part and parcel of the same agreement, the Court must rule against the Bank on the counterclaim for eviction. A party that has failed to comply with a lease with an option to purchase cannot seek to enforce that agreement through an eviction action. The jury advised the Court that the Bank's breach prevented the Longs from performing under the lease with an option to purchase. The Court therefore concludes that the Plaintiffs did not violate the lease with an option to purchase and their option to purchase remains intact.

However, the jury concluded that the Bank did not violate the tribal law prohibiting self-help remedies when it conveyed parcels of the land covered by the lease with an option to purchase to the other Defendants. The Court has no authority therefore to set aside the land conveyances to the other Defendants. The Court acknowledges that this leaves an ultimate resolution of this matter in a state of flux. The parties are urged to seek a resolution of the issues left pending by the jury verdict regarding ownership of the land involved herein.

Now, therefore based upon the foregoing analysis, it is hereby

ORDERED, ADJUDGED, AND DECREED that the motion of the Defendant Bank for judgments notwithstanding the verdict, or in the alternative a new trial, on the counts of breach of contract, bad faith, and discrimination are hereby DENIED, and it is further

ORDERED, ADJUDGED, AND DECREED that the motion of the Defendant Bank for a reduction in the amount of damages of $750,000 is DENIED and it is further.

ORDERED, ADJUDGED, AND DECREED that the

Defendant Bank's counterclaim for eviction of the Plaintiffs from the lands they presently occupy is DENIED at this time, and it is further

ORDERED, ADJUDGED, AND DECREED that counsel for the Plaintiffs shall submit a judgment conforming to the verdict of the jury in this case.

So ordered this 3rd day of January 2003.

BY ORDER OF THE COURT:

s/_____
B.J. Jones
Special Judge

ATTEST: s/_____
Clerk of Courts

# OPPOSITION BRIEF

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(2)

FILED

NOV 26 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-411

IN THE

# Supreme Court of the United States

PLAINS COMMERCE BANK,

*Petitioner,*

*v.*

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG, LILA LONG,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 26, 2007

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## QUESTION PRESENTED

Whether this Court should revisit its rulings in *Williams v. Lee*, 358 U.S. 217 (1959), and *Montana v. United States*, 450 U.S. 544 (1981), that American Indian tribal courts may adjudicate claims arising out of on-reservation commercial dealings between tribal members and nonmembers?

## CORPORATE DISCLOSURE STATEMENT

Respondent Long Family Land and Cattle Company, Inc., states that it is not a publicly held company and does not have any parent corporations. Respondent further states that no publicly held company owns ten percent (10%) or more of its stock.

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## STATEMENT OF THE CASE

This case involves a straightforward application of the rule announced in *Williams v. Lee*, 358 U.S. 217, 223 (1959), and *Montana v. United States*, 450 U.S. 544, 565-566 (1981), that Indian tribes may exercise jurisdiction over claims arising out of the on-reservation commercial dealings and consensual relationships between tribal members and nonmembers.

Petitioner, a nonmember bank doing business in Indian country, voluntarily entered into a loan agreement with respondents, tribal members. Petitioner breached its agreement with respondents and intentionally discriminated against them. Respondents sued petitioner in tribal court, raising claims sounding in contract and tort. Those claims were directly linked to the parties' commercial dealings. The tribal court exercised jurisdiction over respondents' claims. The federal district court and court of appeals upheld the tribal court's exercise of jurisdiction as an appropriate means of regulating petitioner's on-reservation conduct under the first *Montana* exception.

Petitioner asks this Court to review the case and reverse the decisions below. The only way this Court can grant the relief petitioner seeks is to reverse its well-settled rulings in *Williams* and *Montana*. Under the circumstances, review by this Court is not warranted.

### A. Petitioner's Commercial Dealings With The Longs.

This case involves various contract and tort claims brought by Ronnie Long, Lila Long, and the Long Family Land and Cattle Company against Plains Commerce Bank in the Cheyenne River Sioux Tribal Court. Those claims arose out of an on-reservation loan agreement made by the Longs and the bank in 1996.

Ronnie and Lila Long are husband and wife. They are members of the Cheyenne River Sioux Tribe in South Dakota. They have lived on the Cheyenne River Indian Reservations all their lives. They are cattle ranchers. Ronnie Long's parents, Maxine and Kenneth Long, were cattle ranchers from the time Ronnie was a young boy. They, too, lived on the reservation their whole lives. *See* Longs' Appendix in U.S. Court of Appeals (hereafter "L.App.") at 18, 38, 47.

The Long Family Land and Cattle Company was incorporated in 1987. It is a South Dakota family farm corporation. The company was incorporated to qualify for loans guaranteed by the Bureau of Indian Affairs ("BIA") under 25 C.F.R. Part 103. It has always been owned and controlled by Long family members. These family members have at all times owned at least 51% of the corporation's stock, as required by its articles of incorporation. L.App. 13, 23. Petitioner concedes that 51% of Long Company is owned and controlled by tribal members Ronnie and

Lila Long. *See* Petition for Writ of Certiorari (hereafter "Pet.") at 2.

For over forty years, Kenneth and Maxine Long jointly owned 2,230 acres of agricultural land located within the reservation. This land was ultimately deeded to petitioner in the loan agreement at issue in this case. L.App. 18, 40, 43 para. 16.

The Long's company owned cattle, horses, and machinery, and grew crops on the reservation fee land owned jointly by Kenneth and Maxine Long. The company also pastured its livestock year-round on 6,400 acres of Indian trust land leased by Ronnie Long from the Tribe.

From 1989 to 1996, petitioner made numerous loans to the Longs' cattle company. L.App. 18, 41, para. 10. Petitioner required the company to grant petitioner security interests in its livestock, machinery, crops, and feed located on the reservation. L.App. 18, 41, para. 10. Petitioner required Kenneth and Maxine Long to mortgage their land to provide collateral for petitioner's loans. L.App.12, 18, 22, 49-58.

Petitioner's loans to the Longs and their cattle company were guaranteed by the BIA. The BIA guaranteed the loans because the Longs had good credit and because their company was Indian-owned and controlled. Petitioner benefited from the BIA loan guarantees. It received BIA interest subsidy payments and the BIA loan guarantees substantially reduced petitioner's risk of loss. In the event the

cattle company could not repay the loans, petitioner would be paid by the BIA under the guarantees. L.App. 16- 17, 36-37.

There can be no question that petitioner engaged in a longstanding course of commercial dealings with the Longs. Petitioner conceded as much in the tribal court proceedings:

> Plains Commerce Bank, formerly Bank of Hoven, has been doing business with various members of the Long Family and entities owned by them since approximately 1989. Kenneth and Maxine Long, husband and wife, as well as their son, Ronnie Long, and his wife, Lila Long, and Long Family Land and Cattle Company, Inc., the corporation owned by them, all did business with Plains Commerce Bank.
>
> The Bank made numerous loans to Long Family Land and Cattle Company, Inc. Kenneth Long and Maxine Long mortgaged all of the land, which they owned in Dewey County, which was approximately 2,230 acres, to the Bank as collateral for these loans. Both Kenneth Long and Maxine Long personally guaranteed the debt of Long Family Land and Cattle Company, Inc. to the Bank.

Pet. Br. in Support of Motion for Summary Judgment (reprinted in Cheyenne River Sioux Tribe's Appendix in U.S. Court of Appeals [hereafter "C.App."] at 14-15).

Petitioner made an operating loan each year to the Longs to pay ranch expenses. The loan was paid back when the annual calf crops were sold. Kenneth Long died in July of 1995, and after his death petitioner refused to make an operating loan to the Longs. Over a year passed, and the Longs were in dire need of operating money. Petitioner knew that an operating loan was absolutely necessary for the Longs to continue their cattle ranching business. The Longs requested an immediate operating loan and a loan to purchase additional cattle.

In the spring of 1996, petitioner came on the Longs' reservation land and proposed a new financing scheme. Petitioner would make the requested operating and cattle purchase loans, provided that the Longs deed their house and reservation land to petitioner, and petitioner would sell the land back to them on a 20 year contract for deed.

Sometime later petitioner changed the terms. In a letter to Ronnie, petitioner refused the Longs financing to buy back their land on a contract, because of "possible jurisdictional problems" if petitioner sold the land on a contract "to an Indian owned entity on the reservation." L.App. 2, 7; Trial Exhibit (hereafter "Tr.Ex.") 4. The only option petitioner offered the Longs was two years to pay petitioner $478,000 in a lump sum or lose their land. Petitioner's Appendix in U.S. Court of Appeals (hereafter "A.App.") at 4, 28-31.

Petitioner and the Longs entered a consensual agreement on December 5, 1996. It contained several provisions:

- Petitioner agreed to make a $70,000 operating loan to the Long's cattle company to feed and care for the company's cattle;
- Petitioner agreed to make a $37,500 loan to the Longs' company to purchase 110 additional cattle;
- The Longs deeded their 2,230 acres of agricultural land and their house to petitioner for a credit of $478,000 on their debt of $750,000 to petitioner;
- The Longs assigned their federal Conservation Reserve Program ("CRP") contract payments of $44,000 a year to petitioner;
- Petitioner leased the 2,230 acres back to the Longs for two years; and
- Petitioner granted the Longs an option to pay petitioner $478,000 in a balloon payment in two years to buy their land back from petitioner.

L.App. 5-6, 18, 42-43, para.13-14; A.App.5, 33

The Longs' land and house were deeded to petitioner, but petitioner refused to make the Longs the promised $70,000 operating loan or the $37,500 cattle purchase loan. L.App. 18, 6-7.

The Longs had hauled some hay to the winter pastures where the cattle were located, but additional hay had to be moved to the cattle to provide adequate winter feed. Petitioner knew the Longs did not have $20,000 to hire trucks to move their 2,000 tons of hay 20 miles from their 2,230 acres of land, where they baled it, to Ronnie Long's 6,400 acres of leased Indian trust land where the cattle were located. Petitioner knew that without the operating loan the Longs' 625 cattle would not have adequate feed to survive the winter. Petitioner knew that the cattle needed the hay, and that cattle cannot survive winter weather conditions for long without adequate feed. L.App. 18, 44. For decades the Longs wintered their cattle all year in the same pastures, and with adequate feed the cattle weathered severe winter storms without incident. Petitioner knew that without the operating loan the Longs' cattle ranching business would fail, and they could not buy their land back.

Petitioner refused to loan even part of the promised $70,000 operating loan to hire trucks for $20,000 to move the hay to the cattle, or to insure the cattle for winter death loss at a cost of $2,000. L.App. 18, 44; Tr.Ex. 13, p. 2. Petitioner could have made an immediate protective advance emergency loan to move the hay to the cattle under 25 C.F.R. Part 103. Such loans are automatically guaranteed by BIA, without application or BIA approval. Toward the end of December of 1996, with winter setting in and no operating loan from petitioner, Ronnie Long and tribal officer John Lemke requested that

petitioner make such emergency loan, but petitioner refused to do so.

Severe winter storms hit the area in January of 1997, with intense cold, high winds, and deep snow that blocked the roads for days. The cattle ran out of feed and over 500 cows and calves died. As a direct result of petitioner's breach of the loan agreement, refusal to make the promised operating loan to move the hay, and refusal to make a BIA automatically guaranteed emergency loan to move the hay and insure the cattle, the Longs' cattle ran out of feed and over 500 cattle died in the winter storms. L.App. 18, 43-44. Petitioner's breach of the loan agreement caused the Longs disastrous cattle losses, and ruined the cattle ranching business they had successfully operated on the reservation for five decades.

The tribal court jury determined that petitioner acted in bad faith in connection with the loan agreement. L.App.1, 5. The jury also determined that petitioner breached the loan agreement. L.App. 1, 1.

Without income from their cattle, the Longs could not buy their land back from petitioner. L.App. 18, 43-44, para.17. The jury determined that petitioner's breach of the loan agreement prevented the Longs from recapturing their land. L.App.1, 2.

Without their land and cattle, the Longs were out of business. The Longs' actual damages were $1,236,792 for loss of their cattle and loss of use of their land. L.App. 18, 7; Tr.Ex. 14, 23. The tribal

court jury awarded the Longs $750,000 plus prejudgment interest. L.App.1, 6.

In 1999 petitioner sold to non-Indians 1,270 acres of the Longs' land. Petitioner sold the land to non-Indians on terms substantially more favorable than petitioner allowed the Longs, who are Indian tribal members. L.App. 18, 8-9, para. 22. Petitioner required the Longs to pay the full purchase price of $478,000 in a lump sum cash payment in only two years. A.App.4, 29. In contrast, the contract for deed terms Petitioner allowed the non-Indians required payments to petitioner of only $23,229 a year, which were paid by annual federal FSA farm payments on the land. The non-Indians essentially became owners of the Indians' land at no cost. Petitioner's terms of sale for the non-Indians were substantially more favorable than the terms petitioner required of the Longs as Indian tribal members. L.App.18, 46. If the Longs were permitted the same financing terms as petitioner allowed the non-Indians, the Longs would have had little problem buying their land back. The jury determined that petitioner refused such favorable financing to the Longs solely because they are Indian tribal members. L.App.1, 4.

Petitioner made substantial profits over the years from its commercial agreements with the Longs and their cattle company. The Longs paid a substantial amount of interest to petitioner on various loans. In addition, under the 1996 consensual agreement involved in this case, petitioner received well over $1,060,000. Petitioner received deeds to the Longs' house and land valued by petitioner at $478,000, and

petitioner received $88,396 in federal CRP contract payments, $392,968 from the federal BIA guarantees, $100,000 from the assignment of Kenneth's life insurance, several years of federal BIA interest subsidy payments, and several years of federal FSA farm program payments as owner of the land.

Petitioner admits that it went on the reservation to make money from tribal members:

> The bank admits that they were dealing with the tribal members to make money. It wasn't just to help tribal members. The bank was doing it with the intent of making money. That's what any business does. And how much money they made from tribal members, is really nothing for us to even worry about.

Trans. of Oral Arg. in Tribal Ct. App. (reprinted in C.App.1-5).

There is nothing wrong with petitioner making money on the reservation, provided that its activity does not involve unfair, discriminatory conduct that causes damage to tribal members. Petitioner acted in bad faith in its performance of the 1996 consensual agreement. Petitioner intentionally breached the contract, which caused the death of the Longs' cattle and made it impossible for the Longs to buy back their land from petitioner. The intentional wrongful acts of petitioner caused the Longs' family cattle ranching business to fail. They lost their livestock

and their land, and the reservation community lost a productive Indian-owned family business.

**B. The Discrimination Claim.**

The Longs claimed that the petitioner intentionally discriminated against them in connection with the 1996 loan agreement. In the negotiations that led up to the formation of the 1996 loan agreement, petitioner proposed that the Longs deed their house and land on the reservation to petitioner, for a credit of $478,000 against the $750,000 debt owed by the Longs and their cattle company. In return, petitioner would finance the Longs' purchase of their land back from petitioner on a 20-year contract for deed. Petitioner knew that favorable financing terms were critical to the Longs' success in repurchasing their land.

Later in the negotiations, petitioner changed the terms of the proposed deal. In a letter to Ronnie, petitioner told Ronnie that it decided it would not finance the sale of the land back to the Longs on a contract for deed, because of "possible jurisdictional problems" if petitioner sold the land on a contract "to an Indian owned entity on the reservation." L.App.2, 7; Tr.Ex. 4. Petitioner changed the proposed agreement to a two-year lease with an option to purchase. This permitted the Longs only two years to pay the full lump sum of $478,000 to petitioner. Otherwise, they would lose their land. A.App. 3, 28.

The Longs were desperate to reach an agreement because petitioner refused to make any loans to

operate the ranch after Kenneth Long died in July of 1995, and it was fast approaching the end of 1996. They urgently needed operating money to prepare their cattle for the approaching winter. The Longs agreed to the two-year lease and option to purchase, provided that petitioner agreed immediately to make the $70,000 ranch-operating loan. Among other things, they needed $20,000 right away to move their 2,000 tons of hay 20 miles to where their cattle were located to provide their 625 cattle with winter feed. They also requested a $37,500 loan to purchase additional cattle to increase their income so they could buy their land back from petitioner.

In the consensual agreement signed by petitioner and the Longs on December 5, 1996, petitioner agreed to make the $70,000 ranch operating loan, which would enable the Longs to hire trucks to haul their hay to their cattle and prepare the cattle for the rapidly approaching winter weather. Petitioner knew that without the operating loan the Longs had no chance at all to stay in business and buy back their land. After petitioner received the deeds to the Longs' house and land, however, petitioner refused to make the promised loans. The Longs had no money to feed or care for their cattle. Without feed most of their cattle died in the winter storms, and without their cattle income they could not buy back their land from petitioner. The Longs requested an extension of time to buy back their land but petitioner refused. L.App. 9, 11.

The tribal court jury determined that petitioner acted in bad faith in connection with the loan

agreement. L.App. 1, 5. The jury determined that petitioner breached the loan agreement. L.App.1, 1. The jury also determined that petitioner's breach of the loan agreement prevented the Longs from buying back their land. L.App.1, 2.

Petitioner sold 1,270 acres of the Longs' Indian owned land to non-Indians. Petitioner sold the land on terms substantially more favorable than the terms petitioner allowed the Longs, who are Indian tribal members. L.App. 18, 8-9, para. 22. The Longs' discrimination claim arose directly from the Longs' preexisting, ongoing commercial consensual relationship with petitioner. In the 1996 consensual agreement, petitioner required the Longs to pay the full purchase price of $478,000 in a lump sum cash payment in only two years. A.App. 4, 29. In contrast, the financing terms petitioner allowed the non-Indians required payments to petitioner of only $23,229 a year, which were paid by the annual federal FSA farm payments on the land. The non-Indians essentially became owners of the Indians' land for free. Petitioner's terms of sale for the non-Indians were substantially more favorable than terms petitioner required of the Longs in the 1996 consensual agreement. L.App. 18, 46. If the Longs were permitted the same financing terms as petitioner allowed the non-Indians, the Longs would have had little problem buying their land back.

The Longs claimed in their complaint in tribal court that the sale of their land to non-Indians on term more favorable than petitioner required of them in the 1996 contract, constituted unequal treatment

and unfair discrimination against them as Indians. A.App.20, 71. There is a close factual nexus between the Longs' discrimination claim and the 1996 consensual agreement. The facts of this case show that petitioner refused financing to the Longs to buy back their land, solely because they are Indians and tribal members. The jury agreed and determined that petitioner "intentionally discriminated" against the Longs "based solely upon their status as Indians or tribal members." L.App. 1, 4.

The jury's verdict that petitioner "intentionally discriminated" against the Longs "based solely upon their status as Indians and tribal members" has been affirmed by the Tribal Court of Appeals, the United States District Court, and the United States Court of Appeals for the Eighth Circuit.

**C. The Proceedings Below.**

Petitioner filed this action against the Longs in the United States District Court for the District of South Dakota. Petitioner sought a declaratory judgment that the tribal court judgment upholding the jury verdict against petitioner for discriminatory lending practices was null and void. Cross motions for summary judgment were filed by petitioner and the Longs. The district court granted the Longs' motion for summary judgment. The court held, among other things, that:

- Petitioner had entered into numerous consensual relationships with the Longs and their cattle company;

- Petitioner's tortious conduct was directly related to its consensual relationships with the Longs and their company;

- Petitioner was not deprived of due process of law in the tribal court proceedings; and

- The tribal court had jurisdiction over the Longs' discrimination claim against petitioner under the Supreme Court's decision in *Montana*.

Petitioner appealed, and the Eighth Circuit Court of Appeals affirmed. The court held, among other things, that:

- Petitioner's transactions with the Longs and their cattle company were "consensual relationships" within the meaning of the first *Montana* exception;

- The Longs' contract and tort claims had a close nexus to the petitioner's consensual relationship with the Longs and their cattle company;

- Adjudication of the Longs' contract and tort claims was an appropriate means for the tribe to regulate petitioner's conduct on the reservation; and

- Petitioner was not denied due process of law in the tribal court proceedings.

## REASONS FOR DENYING THE WRIT

### I. The Cheyenne River Sioux Tribal Courts' Exercise Of Civil Jurisdiction Over Petitioner Is Precisely The Kind Of Tribal Regulation Of Nonmember Activity Authorized By This Court In *Montana v. United States* (1981).

American Indian tribes are "self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Although they accepted "the protection of the United States of America" through treaties, see, e.g., Treaty with the Teton, 1815, Art. 3 (7 Stat. 125), Indian tribes retain the sovereign status of "domestic dependent nations," *Oklahoma Tax Comm'n v. Potawatomi*, 498 U.S. 505, 509 (1991); *accord Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), and continue to "'possess[] attributes of sovereignty over both their members and their territory,'" *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)); *accord Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

"Tribal courts play a vital role in tribal self-government ... and the Federal Government has consistently encouraged their development. Although the criminal jurisdiction of tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) (citations

omitted). Tribal courts are categorically barred from exercising criminal jurisdiction over non-Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), yet they may, in certain circumstances, exercise civil jurisdiction over non-Indians and other non-tribal-members.

*Montana v. United States*, 450 U.S. 544 (1981), is the "pathmarking case" concerning tribal civil authority over nonmembers. *Nevada v. Hicks*, 533 U.S. 353, 358 (2001). *Montana* provides that, as a general matter, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S., at 565. However, this general proposition is subject to controlling provisions in treaties, congressional legislation enlarging tribal court jurisdiction, and the two exceptions identified in *Montana*. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

The *Montana* Court stated that, "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S., at 565. The Court set forth the so-called "*Montana* exceptions" as follows:

> [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [2] A tribe may also retain inherent power to exercise civil

> authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S., at 565-565 (citations omitted).

The case *sub judice* involves the straightforward application of the first *Montana* exception. Petitioner, a nonmember bank, voluntarily entered into a loan agreement with the Longs and their cattle company in 1996. The Longs' breach of contract and discrimination claims against petitioner arose out of that loan agreement and the negotiations and dealings associated therewith. Adjudication of the Longs' claims in tribal court was an appropriate exercise of tribal authority over petitioner.

The Eighth Circuit correctly ruled that petitioner had "engaged in the kind of consensual relationship contemplated by *Montana*" since it "transacted business" with the Longs' cattle company—"a corporation of conspicuous tribal character"—and since it "formed concrete commercial relationships with the Indian owners of that corporation." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 491 F.3d 878, 886 (8th Cir. 2007) (reprinted in Petitioner's Appendix [hereafter "Pet. App."] at A-12).[1]

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[1] As has been noted, petitioner entered into many consensual agreements with the Longs individually, and with

Petitioner cannot argue—and, indeed, *does not* argue in its petition—that it did not have a consensual relationship with the Longs and their cattle company. Similarly, petitioner cannot argue that the tribal court's exercise of jurisdiction did not have a "nexus to the consensual relationship itself." *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). Indeed, the Eighth Circuit correctly found that the Longs' claims "arose directly from their preexisting commercial relationship with the bank." 491 F.3d, at 887 (Pet. App. 13).

Under these circumstances, the Eighth Circuit's decision upholding the jurisdiction of the Cheyenne River Sioux Tribal Courts is wholly unremarkable. The court held that, "in that narrow set of circumstances where the consensual relationship exception is otherwise completely satisfied," *Plains Commerce Bank*, 491 F.3d, at 887 (Pet. App. A-14), a tribe has the authority—through tort law, licensing requirements, or other statutory provisions—to "hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members." *Id.*

The Eighth Circuit recognized that tribes have the "inherent authority 'to prescribe the terms upon which noncitizens may transact business'" with tribal

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their cattle company, including loan agreements, promissory notes, mortgages, security agreements, individual loan guarantees, an assignment of CRP contract payments, an assignment of life insurance, a lease of the land, and an option to purchase the land. *See* L.App.18, 41, 43, 58.

members. *Plains Commerce Bank*, 491 F.3d, at 887 (Pet. App. A-13-A-14) (quoting *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905)).

Petitioner intentionally breached its loan agreement with the Longs and intentionally discriminated against the Longs. Petitioner's conduct caused the Longs to suffer substantial damages and ruined the their family cattle ranching business. The tribal tort of discrimination in this case provided a standard of conduct to govern petitioner's consensual agreements and preexisting consensual relationship with tribal members. By subjecting petitioner to civil liability for violating tribal antidiscrimination law in the course of its business dealings with the Longs, the Tribe was properly setting limits on how nonmembers may engage in commercial transactions with members inside the reservation.

## II. The Only Way This Court Can Grant The Relief Petitioner Seeks Is To Reverse Its Rulings In *Williams v. Lee* (1959) And *Montana* That Tribal Courts May Adjudicate Claims Arising Out Of Commercial Dealings Between Tribal Members And Nonmembers.

Petitioner argues that, even though it may have entered a consensual relationship with the Longs and their cattle company, it was not properly subject to the civil jurisdiction of the tribal court since tort law is not a valid form of tribal regulation under the first *Montana* exception. Pet. at 5.

Petitioner attempts to fabricate a false dichotomy between the two *Montana* exceptions. Petitioner asserts that the two exceptions "differentiat[e] the scope of a tribe's regulatory and civil authority over nonmembers." Pet. 13. According to petitioner, tribal authority under the first exception is "limited to taxation, licensing, or other similar legislative controls." *Id.* Tribes may not exercise civil adjudicatory authority over nonmembers under the first *Montana* exception. Rather, a "tribe's civil-adjudicatory authority [is] defined and limited by the second *Montana* exception." Pet. 9. The second exception authorizes civil court jurisdiction, but according to petitioner it does not authorize taxation, licensing, or other legislative controls.

This interpretation of the *Montana* exceptions is at odds with the Supreme Court's decision in *Williams v. Lee*, 358 U.S. 217 (1959). It is also at odds with *Montana* and the Court's subsequent decisions applying the principles announced in *Montana*. Under these precedents, it is well settled that Indian tribal courts may adjudicate common law causes of action, including contract and tort claims, as an appropriate means of regulating the activities of nonmembers who enter consensual relationships with tribal members. Further, the Court's decisions make clear that the two *Montana* exceptions do not differentiate between the types of authority tribes may exercise. Rather, they differentiate between the categories of nonmember conduct over which *all* forms of tribal civil authority, including adjudicatory authority, may be asserted.

### A. *Montana* And Its Progeny Recognize That Tribal Adjudication Of Common Law Claims Is A Valid Means of Regulating The Conduct Of Nonmembers Who Enter Consensual Relationships With Tribal Members.

In *Montana*, the Supreme Court held that, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S., at 565-566. The Court cited four cases in support of this proposition: *Williams v. Lee*, *supra*; *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, *supra*; and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). The consensual relationship exception must be construed in light of these cases. Indeed, in *Strate*, the Court stated that, "*Montana*'s list of cases fitting within the first exception indicates the type of activities the Court had in mind," *Strate*, 520 U.S., at 457, when it affirmed tribal authority over nonmembers who enter consensual relationships with tribes or tribal members.

Three of these cases cited by the *Montana* Court—*Morris*, *Buster*, and *Colville*—concerned tribal authority to tax or license the on-reservation activities of non-Indians.[2] The fourth—*Williams*—

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[2] *Morris* upheld application of the Chickasaw Nation's annual permit tax and licensing requirements on non-Indians

concerned the authority of Indian tribal courts to adjudicate disputes involving non-Indians. The Court held in *Williams* that, "the right of Indians to govern themselves" includes the right to exercise jurisdiction over civil suits involving non-Indians who transact business with tribal members in Indian country. 358 U.S., at 223. The suit at issue in *Williams* was a common law contract action between a non-Indian general store proprietor and two tribal members who had entered a consensual relationship for the sale of goods on the Navajo Indian Reservation. *Id.*, at 217-218.

The *Montana* Court's citation of *Williams* makes clear that tribal court adjudication of common law claims is included within the "other means" by which tribes may "regulate ... the activities of nonmembers who enter consensual relationships with the tribe or its members." *See Montana*, U.S., at 565-566. *See also Strate*, 520 U.S., at 457, 458.

Construing the language of the first *Montana* exception without regard to the cases cited in support of it has led petitioner astray. Petitioner's suggestion that taxation, licensing, and other similar

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grazing livestock on Chickasaw land under contracts with individual tribal members. 194 U.S., at 393. *Buster* upheld the Creek Nation's annual permit tax on non-Indians engaging in trade with tribal members within limits of the Creek Nation. 135 F. at 950. *Washington* upheld the imposition by the Colville, Makah, and Lummi tribes of sales taxes on non-Indians purchasing cigarettes from Indian vendors on tribal lands. 447 U.S., at 152-154.

practices are the only means by which tribes can regulate nonmembers who enter consensual relationships with tribal members is simply incorrect.

Since *Montana*, this Court has recognized tribal adjudication of common law claims as a valid means of regulating the on-reservation conduct of nonmembers who enter into consensual relationships with tribal members. On four occasions, the Court has addressed the power of Indian tribal courts to adjudicate tort claims brought by tribal members against nonmembers. In none of these cases did the Court suggest that tribal tort law—or, to be more precise, the adjudication in tribal court of tort claims against nonmembers—was an inappropriate means for tribes to regulate the on-reservation conduct of nonmembers.

*National Farmers Union* (1985), involved a tort claim filed in the Crow Tribal Court by the guardian of a Crow Indian child against a non-Indian insurance company and a state-chartered school district. 471 U.S., at 847. The child was struck by a motorcycle in the parking lot of a school located within the Crow Indian Reservation. *Id.* The child's guardian sued the school district for damages. *Id.* The school district and its insurance company filed suit in federal court to challenge the jurisdiction of the tribal court. *Id.*, at 848. The Court declined to rule on the jurisdictional challenge. Instead, it remanded the case to allow the tribal court to examine in the first instance the existence and extent of its jurisdiction under the *Montana*

exceptions. The Court required the non-Indian litigants to "exhaust the remedies available to them in the Tribal Court system." *Id.*, at 857. The Court did not reject tribal tort law as a method of regulating the on-reservation activities of nonmembers.

Similarly, in *Iowa Mutual* (1987), the Court refused to enjoin a tort suit brought in the Blackfeet Tribal Court by a member of the Blackfeet Indian Tribe against a non-Indian insurance company. The tribal member's tort claim sought compensatory and punitive damages against the insurance company for bad-faith refusal to settle an insurance claim. 480 U.S., at 11. As in *National Farmers Union*, the Court remanded the case to allow the tribal court to examine in the first instance the existence and extent of its jurisdiction under the *Montana* exceptions. *Id.*, at 16-18. Once again, the Court could have, but did not, reject tribal tort law as a basis for regulating the conduct of nonmembers under *Montana*'s first exception.

In *Strate* (1997), the Court again considered "the adjudicatory authority of tribal courts over personal injury actions against defendants who are not members of the tribe." 520 U.S., at 442. In this case, Gisela Fredericks, a non-Indian woman brought a tort action against a non-Indian-owned contracting company (and others) in the Tribal Court for the Three Affiliated Tribes of the Fort Berthold Reservation for injuries she sustained in an on-reservation motor vehicle collision with one of the contractor's employees. *Id.*, at 442-444. The

contractor was present on the reservation pursuant to a contract with a tribally-owned corporation to perform landscaping work related to the construction of a tribal community building. *Id.*, at 443.

The *Strate* Court rejected the jurisdiction of the tribal court under first *Montana* exception because there was no nexus between the tort action and the contractor's consensual relationship with the tribes:

> The first exception to the *Montana* rule covers activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. The tortious conduct alleged in Fredericks' complaint does not fit that description. The dispute ... is distinctly non-tribal in nature. It arose between two non-Indians involved in a run-of-the-mill highway accident. Although A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a "consensual relationship" with the Tribes, Gisela Fredericks was not a party to the subcontract, and the Tribes were strangers to the accident.

520 U.S., at 456-457 (internal quotation marks and citations omitted).

The *Strate* Court did not hold that tribal tort law is an inappropriate basis to regulate the on-reservation conduct of nonmembers who enter consensual relationships with tribes or tribal

members. Instead, the *Strate* Court based its holding on the absence of a nexus between the tort action itself and the underlying consensual relationship.

Unlike *Strate*, this case involves the adjudication of tribal common law claims that are directly linked to a consensual relationship between a nonmember, petitioner, and tribal members, the Longs. These claims, arising under tribal contract and tort law, are inextricably linked to the commercial dealings and the formation and negotiation of the contracts between petitioner and the Longs.

Finally, in *Hicks* (2001), the Court held that a tribal court did not have jurisdiction over "civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." 533 U.S., at 355. Among the civil claims at issue were the common law tort claims of "trespass to land and chattels" and "abuse of process." *Id.*, at 357. These common law claims were "brought under ... tribal ... law." Id. The Court concluded that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations ..." *Id.*, at 364. The Court was careful, however, to note the limited nature of its holding: "Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.*, at 358 n.2.

In *Hicks*, the Court did not rule—indeed, the Court has *never* categorically ruled—that tribal courts lack jurisdiction under the first *Montana* exception over common law tort claims brought by tribal members against nonmember defendants.

Against this backdrop, the Eighth Circuit correctly held that tribal tort law is an appropriate means by which a tribe may regulate nonmember conduct under the first *Montana* exception. The court recognized that, like "licensing requirements" and "statutory provision[s]," tort law is "a means of regulating conduct." *Plains Commerce Bank*, 491 F.3d, at 887 (Pet. App. A-14) (citing W. Page Keeton, *et al.*, PROSSER AND KEENON ON TORTS 25 (5th ed. 1984)). It is also "an important aspect of tribal self-governance." *Id.* (citations omitted). The court further recognized that, in many cases, the adjudication of common law claims is functionally equivalent to the enforcement of statutory provisions. *Id.* (citing *Curtis v. Loether*, 415 U.S. 189, 195 (1974)).

The Eighth Circuit's decision is consistent with *Williams*, *Montana*, and the Court's cases applying *Montana*. To grant the relief petitioner seeks, this Court would have to revisit and reverse its holding in *Williams* that tribal courts have jurisdiction over claims arising out of on-reservation commercial dealings between tribal members and nonmembers. It would also have to cast aside the reasoning and logic of the *Montana* exceptions as articulated and developed in *Montana* and the cases decided thereunder.

### B. The *Montana* Exceptions Are Distinguished Not By The Types Of Tribal Powers They Authorize, But By The Types Of Nonmember Conduct Over Which Tribal Powers Are Authorized.

Petitioner argues that by affirming tribal adjudicatory authority under the first *Montana* exception, the Eighth Circuit has somehow allowed the first *Montana* exception to engulf or envelope the second exception, rendering the latter meaningless and unnecessary. Pet. 13. Petitioner argues that the two *Montana* exceptions are distinguished by the types of tribal authority they authorize. According to petitioner, the first *Montana* exception authorizes tribal regulation, including taxation and licensing, and the second exception authorizes tribal court adjudication of disputes involving nonmembers. Petitioner argues that by upholding tribal court adjudicatory jurisdiction under the first exception, as opposed to the second, the Eighth Circuit rendered meaningless the distinction between the two exceptions. This argument misses the mark entirely.

As has been shown, the first *Montana* exception is as much about tribal adjudicatory authority as it is about taxation, licensing or other forms of regulation. Similarly, the second *Montana* exception has as much to do with taxation and regulation as it does the adjudication of lawsuits.

The *Montana* Court cited four cases after its statement of the second *Montana* exception: *Fisher v. District Court*, 424 U.S. 382 (1976); *Williams v. Lee*,

*supra*; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906); and *Thomas v. Gay*, 169 U.S. 264 (1898). "[E]ach of those cases raised the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government." *Strate*, 520 U.S., at 458. Two of the cases concerned the relative competence of state and tribal courts to adjudicate certain claims arising in Indian country. In both cases, the Court found tribal jurisdiction to be exclusive. *See Fisher*, 424 U.S., at 386 (1976) (exclusive tribal jurisdiction over adoption proceedings when all parties are tribal members residing on the reservation); *Williams*, 358 U.S., at 220 (exclusive tribal jurisdiction over claims arising out of on-reservation commercial dealings between nonmember merchants and tribal members). The other two cases concerned taxation. Both dealt with "objections to a county or territorial government's imposition of a property tax on non-Indian-owned livestock that grazed on reservation land." *Strate*, 520 U.S., at 458. In both cases, the Court found that the state taxes did not unlawfully intrude on core tribal interests. *See Montana Catholic Missions*, 200 U.S., at 128-129; *Thomas*, 169 U.S., at 273. The *Montana* Court's citation of these tax cases confirms that the second exception applies to all types of tribal authority, not just "civil-adjudicative power," as petitioner asserts. Pet. at 5.

Since it decided *Montana*, the Court has addressed, on three occasions, the power of Indian tribes to impose regulations or taxes on nonmembers. *See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S.

408 (1989) (tribal zoning of fee land owned by nonmembers within reservation); *South Dakota v. Bourland*, 508 U.S.679 (1993) (tribal regulation of hunting and fishing by nonmembers on non-trust land within reservation); and *Atkinson Trading Co., supra* (2001) (tribal taxation of nonmember guests of on-reservation hotel). Had the Court followed petitioner's logic, it would have analyzed these cases only under the first *Montana* exception, since that exception is the only one to refer explicitly to tribal "regulat[ion]" and "taxation." *See* 450 U.S., at 565. However, in each of the cases, the Court analyzed the extent of tribal power under both of the *Montana* exceptions. Indeed, in *Brendale*, the Justices invoked the second *Montana* exception, not the first, to uphold the tribal zoning laws as applied to non-Indian fee land within the closed area of the Yakima Indian Reservation.

*Brendale*, *Bourland*, and *Atkinson* confirm that the second *Montana* exception, like the first, pertains to all forms of tribal authority, including adjudicatory, regulatory, and taxing authority.

Petitioner attaches far too much importance to use of the word "regulate" in the first *Montana* exception and the use of the phrase "exercise civil authority" in the second exception. These terms are, for all intents and purposes, synonymous. A sovereign's ability to regulate is no different than its ability to exercise civil authority over its subjects. Indeed, the *Montana* Court used the terms interchangeably. In deciding whether either exception justified tribal regulation of non-Indian

hunting and fishing on the Crow Reservation, the *Montana* Court stated:

> Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to *tribal civil jurisdiction*. And nothing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify *tribal regulation*.

450 U.S., at 566 (emphasis added).

The *Montana* exceptions are differentiated not according to the types of tribal power they authorize, but according to the type of nonmember conduct at issue. The first exception concerns the activities of nonmembers who enter consensual relationships with tribal members. The second exception concerns conduct that imperils core tribal interests. Both exceptions authorize tribal adjudicatory authority as well as regulatory authority.

In the end, Petitioner's argument as to the structure of, and interplay between, the two *Montana* exceptions must give way. So, too, must petitioner's case, for petitioner makes no other argument as to why it might be inappropriate or unfair to allow tribes to exercise civil adjudicatory authority over nonmembers who voluntarily do

business with tribes or tribal members in Indian country.[3]

## III. The Eighth Circuit's Decision Does Not Create New Law Or A Split Among The Circuits.

Petitioner attempts to create alarm in this Court by suggesting that the decision of the Eighth Circuit held—for the first time by any court—that: (1) tribes may exercise adjudicatory jurisdiction over nonmembers under *Montana*'s first exception; and (2) tribes may regulate nonmember conduct on non-Indian fee land within Indian country. Petitioner is mistaken on both counts.

### A. The Eighth Circuit's Decision Does Not Expand The Scope Of Tribal Authority Under The First *Montana* Exception.

Petitioner's suggestion that the Eighth Circuit's decision expanded exponentially the scope of tribal court jurisdiction over nonmembers is disingenuous. Since *Montana* was decided, the lower federal courts have routinely upheld the adjudicatory jurisdiction of Indian tribal courts over tribal law causes of action arising out of the commercial dealings, contracts, and other consensual relationships of nonmembers and Indian tribes and tribal members. These courts have not questioned the propriety under *Montana*'s

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[3] Petitioner received a full and fair trial in the tribal court and has explicitly asked this Court *not* to review the Eighth Circuit's ruling that petitioner was not denied due process of law in the tribal court proceedings. Pet. i.

first exception of using the tribal common law as a means of regulating non-Indian conduct in Indian country.

In *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir.), *cert. denied*, 126 S. Ct. 2893 (2006), the court invoked *Montana*'s first exception to uphold the authority of an Indian tribal court to hear a tort action between a non-Indian and a tribally-controlled community college. The suit concerned an on-reservation motor vehicle accident and "allegedly tortious acts committed on tribal lands." 434 F.3d at 1134. In *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989), the court cited the first *Montana* exception and upheld tribal court jurisdiction over a tribal law divorce proceeding filed by a tribal member against her non-Indian spouse. 864 F.2d at 632-633. The marriage itself constituted a consensual relationship justifying the exercise of tribal adjudicatory jurisdiction. Id. The Ninth Circuit also affirmed the application of tribal tort law against a nonmember defendant in *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002).

The federal district courts have reached similar results.[4] These lower court precedents—and those of

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[4] *See, e.g., Malaterre v. Amerind Risk Management*, 373 F.Supp.2d 980, 985 (D.N.D. 2005) (common law negligence action); *Fidelity and Guaranty Insurance Company v. Bradley*, 212 F.Supp.2d 163 (W.D.N.C. 2002) (action for indemnification); *Warn v. Eastern Band of Cherokee Indians*, 858 F.Supp. 524, 527 (W.D.N.C. 1994) (common law breach of contract action); *Tom's Amusement Company, Inc. v. Cuthbertson*, 816 F.Supp. 403, 406 (W.D.N.C. 1993) (common law contract dispute). *See*

this Court—make it clear that tribal court adjudication of common law claims, including common law tort claims, is an appropriate method for tribes to regulate the activities of non-Indians who enter consensual relationships with the tribes or their members.

In this case, the Longs' common law contract and tort claims against the petitioner arose directly out of—and were inextricably linked to—their commercial dealings and contracts with the petitioner. There was a direct nexus between the Longs' causes of action and the underlying consensual relationship.

### B. The Eighth Circuit's Decision Does Not Extend The Territorial Reach Of Tribal Authority.

Petitioner misapprehends the *Montana* exceptions when it argues that "neither the first nor second *Montana* exceptions apply because the land at issue is not Indian-owned." Pet. 14. Petitioner ignores the fact that the *Montana* exceptions were set forth specifically to define the scope of tribal authority over nonmember activity on "non-Indian fee lands" within Indian country. *Montana*, 450 U.S., at 565.

While it is true, as petitioner states, that in *Montana* and *Strate* the Court rejected tribal

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*also Cheromiah v. U.S.*, 55 F.Supp.2d 1295, 1304 (D.N.M. 1999).

authority over nonmember activity on land that was not tribally owned or controlled, Pet. 13 (citing *Hicks*, 533 U.S., at 359), it did so not because the land had been alienated or encumbered, but because neither of the *Montana* exceptions had been satisfied in those cases. *See Montana*, 450 U.S. at 566, and *Strate*, 520 U.S., at 457-459.

In this case, the first *Montana* exception has been satisfied. Therefore, the Eight Circuit correctly held that the tribe has jurisdiction over petitioner notwithstanding the fact that the land at issue is non-Indian fee land.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: November 26, 2007

# REPLY BRIEF

77

(3)

No. 07-411

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# In the Supreme Court of the United States

PLAINS COMMERCE BANK,

*Petitioner,*

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG, LILA LONG,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITIONER'S REPLY BRIEF

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## RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or publicly held company owning 10% or more of its stock.

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## PETITIONER'S REPLY BRIEF

### 1. The Longs' factual characterization is irrelevant to the question the Bank presents for review.

The Longs spend nearly half of their brief in opposition to the Bank's petition for certiorari arguing about the facts. Although the Bank disagrees with their characterization, that is an issue to be addressed in briefing if this Court grants review. There is no record presently before this Court that would enable a full review of the facts.

It is important to keep in mind, however, the procedural posture of this case. The Bank and the Longs brought cross-motions for summary judgment in the district court. The district court determined that there was no genuine issue as to any material fact. The Court of Appeals agreed.

For purposes of this petition, the operative facts are undisputed. The Bank had a contract with a South Dakota corporation, a 51% majority of shares of which was held by tribal members, concerning land the Bank owned in fee on the reservation. The dispute between the Bank and the Longs that was litigated in tribal court arose out of that relationship. The Bank is an off-reservation bank, and the contract was signed off reservation in the Bank's offices. Whether that is a consensual relationship with a tribe or its members and whether there is a sufficient nexus between the relationship and the claim to support tribal court jurisdiction under the Montana test is a question for this Court to decide.

**2. Montana didn't authorize tribal-court civil jurisdiction over nonmember defendants as an "other means" of regulating consensual relationships.**

After establishing the general rule that, "the inherent sovereign powers of an Indian tribe do not extend to nonmembers of the tribe," this Court recognized two exceptions. Montana v. U.S., 450 U.S. 544, 565 (1981). Indian tribes have the power to regulate activities of nonmembers who enter consensual relationships with the tribe or its members through licensing, taxation or *other means.* Id. at 565. And tribes can exercise civil authority over nonmembers on fee lands within their reservations when nonmember conduct threatens the political integrity, economic security, or health or welfare of the tribe. Id. at 566. This case concerns only the first and not the second exception.

This Court, however, has never interpreted the first Montana exception to include civil adjudication of claims against nonmembers as an "other means" of regulating consensual relationships. In Hicks, this Court explicitly left that question open. Nevada v. Hicks, 533 U.S. 353, 358 n.2 (2001).

**3. Williams restricted state-court jurisdiction over tribal members; it did not address tribal-court jurisdiction over nonmember defendants.**

The Longs reliance on Williams v. Lee, 358 U.S. 217 (1959), is misplaced. It is true that Montana cites Williams as providing a historical basis for

developing both the first and second Montana exceptions. See, e.g., Montana, 450 U.S. at 565-66. But that does not change what Williams actually held.

The question in Williams was whether an Arizona state court had jurisdiction to hear a claim by a nonmember storekeeper against tribal members who bought goods on credit. Williams, 358 U.S. at 217-18. This Court held that it did not. Id. at 223. Williams does not directly define the scope of tribal-court jurisdiction over nonmembers. It was not a broad statement about tribal-court jurisdiction. Instead, it was a statement about the limits of state-court jurisdiction over tribal members. Williams sheds no light on the question of whether a nonmember can be made a defendant in tribal court.

A tribal court having jurisdiction over a nonmember defendant presents a more difficult situation than a tribal court adjudicating a nonmember's claim against a member. Tribal courts presumably have jurisdiction over tribal members. A tribal member who is made a defendant in tribal court in a claim by a nonmember would presumably be unsuccessful in raising a challenge to the tribal court's jurisdiction.

It isn't enough, though, under the first Montana exception analysis to find that there is a consensual relationship between a tribe or tribal member and a nonmember, and that there is a nexus between the relationship and the claim. A tribe may regulate a consensual relationship through licensing

or taxation. But it does not follow that the nonmember may be forced to defend against civil tort claims in tribal court. Tribal courts do not have civil adjudicatory jurisdiction to litigate claims against nonmember defendants based on consensual relationships because that is not an "other means" of regulation under the first Montana exception. On the other hand, a tribal court would have civil adjudicatory jurisdiction to litigate claims against a nonmember defendant whose conduct on fee land within the reservation threatens the political integrity of the tribe.

The Longs argue that the citation of Williams in Montana "makes clear" that tribal court adjudication of common law claims is included within the other means by which tribes may regulate activities of nonmember who engage in consensual relationships. It is far from clear, however. Williams did not hold that. And neither did Montana. Indeed, this Court has never held that.

The Longs' citation of National Farmers, Iowa Mutual, Strate, and Hicks to support this argument is inapposite. National Farmers and Iowa Mutual are both exhaustion cases. Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985); and Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987). This Court's decision to send a case back to tribal court to have it determine its own jurisdiction in the first instance is not an endorsement of jurisdiction over nonmember defendants. Strate involved a suit in tribal court between two nonmembers where there was no nexus between the claim and the tribal

consensual relationship, and the tort occurred on non-Indian fee land. Strate v. A-1 Contractors, 520 U.S. 438 (1997). It does not follow from this Court's rejection of jurisdiction because of a lack of a nexus that it would find jurisdiction over a nonmember where there is a nexus. Hicks ultimately rejected tribal-court jurisdiction. Nevada v. Hicks, 533 U.S. 353 (2001). The Longs read the comment in Note 2 of the Hicks opinion as an endorsement of jurisdiction over nonmember defendants; the Bank reads it as an admonition that nothing in the opinion should be read as an expansion of tribal-court jurisdiction over nonmembers. Only this Court can clarify what it meant.

The Longs' position is that this Court has never categorically ruled that tribal courts lack jurisdiction under the first Montana exception over common-law tort claims brought by members against nonmembers. That is true. The Bank, however, is equally correct in its observation that this Court has never categorically endorsed such jurisdiction. It is because of this void and the resulting confusion that this Court should grant the Bank's petition.

**4. The distinction between the regulation authorized by the first Montana exception and the civil authority authorized by the second Montana exception comes from this Court's language in Montana.**

The Bank disagrees with the Longs' assertion that the second Montana exception necessarily encompasses taxation and licensing, whereas the first Montana exception necessarily encompasses civil

adjudication. If this Court meant for "regulation" and "civil authority" as used in the two Montana exceptions to be synonymous, there would be no need to distinguish the two exceptions as it did.

The distinction appears significant, however. In addressing consensual relationships, the first Montana exception recognizes licensing and taxation as modest administrative powers that the tribe can exercise over consenting nonmembers. Montana, 450 U.S. at 565. The second Montana exception, addressing nonmember conduct that threatens the political integrity, economic security, or health or welfare of the tribe, authorizes more substantial "civil authority." Id. at 566. The Bank's interpretation is that "civil authority" is synonymous with civil adjudication, whereas "regulation" is not. This interpretation, that there is a spectrum of increasing severity created by the distinction between regulatory and civil adjudicatory authority, is consistent with the nuanced analysis this Court has previously applied to questions regarding tribal power over nonmembers. See, e.g., Oliphant v. Suquamish Indian Tribe 435 U.S. 191, 205 (1978) (holding tribes lack criminal jurisdiction over nonmembers).

One commentator has suggested that this Court's decisions in Strate and Hicks adopted a "new analytic framework." F. Cohen, Handbook of Federal Indian Law 232 (2005). The elevated threshold for satisfying the two Montana exceptions discussed in Strate "appears to have effected a diminishment of both Montana exceptions," while extending the general rule's presumption against tribal authority

over nonmembers. Cohen, *supra* at 233-34. Hicks continued this recent trend of decisions disfavoring tribes' power to govern the conduct of nonmembers. Cohen, *supra* at 234.

As this Court noted in Hicks, a tribe's adjudicative jurisdiction does not exceed its legislative (or regulatory) jurisdiction. Hicks, 533 U.S. at 358. The Hicks opinion left open the question of whether a tribe's adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction; it may well be less. This Court applied a close contextual reading to first Montana exception in Hicks. 533 U.S. at 359 n.3. Such a reading makes it clear that "other means" referred to in the first Montana exception are regulatory, not adjudicative, means. The Longs' interpretation of the scope of the two Montana exceptions cannot be reconciled with this Court's cautionary language in Hicks.

The Longs cite inapposite cases in support of their interpretation that the scope of the two Montana exceptions is coextensive. Brendale applied the second Montana exception to permit zoning of nonmember fee land within the reservation. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). It didn't address tribal-court jurisdiction over nonmember defendants. In Bourland and Atkinson, this Court concluded that the tribe had no power to regulate and no power to tax, respectively. South Dakota v. Bourland, 508 U.S. 679 (1993); and Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001). Taken together, these three cases do not support the Longs' broad

generalization about the alleged coextensive scope of the two Montana exceptions.

And even if it could be argued that the second Montana exception encompasses a power to regulate, it does not follow that the first Montana exception encompasses a power to adjudicate disputes involving nonmember defendants. There is a substantial difference between the authority to tax or license a nonmember in a consensual relationship with a tribe and forcing a nonmember defendant to come to tribal court as a defendant in litigation.

There is, for example, no right of removal from tribal court to federal court as there might be for a non-resident defendant in state court. Hicks, 533 U.S. at 368-69. The Bill of Rights and the Fourteenth Amendment do not apply in tribal court. It is a different legal system. As Justice Souter observed:

> Tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.' . . . . The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' . . . which would be unusually difficult for an outsider to sort out.

Hicks, 533 U.S. at 384-85 (Souter, J., concurring).

Because this case concerns only the first Montana exception, the sole question is whether the scope of this exception is coextensive with the civil authority authorized by the second exception so as to encompass tribal-court jurisdiction over nonmember defendants. The Bank urges this Court to grant its petition to explain that this is not so.

**5. This Court, as opposed to lower courts, should determine whether tribal courts have jurisdiction over tort claims against nonmember defendants in consensual relationships arising out of non-Indian fee land.**

Just because some lower courts have not questioned the propriety of extending the first Montana exception to include tribal-court jurisdiction over tort claims against nonmember defendants does not mean that their analysis is correct. And the cases the Longs cite in support of this argument do not extend nearly as far as they suggest.

In Smith, the 9th Circuit Court of Appeals considered the situation of a nonmember plaintiff bringing a claim against the tribe in tribal court. Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir.), *cert. denied*, 126 S.Ct. 2893 (2006). In concluding that there was jurisdiction, the court used the fact of the plaintiff having brought a claim (albeit as a defendant's counterclaim later repositioned as a plaintiff's claim) as the consensual relationship that provided a basis for jurisdiction. Such jurisdictional bootstrapping seems inherently unsound. Sanders was a marital-dissolution action in tribal court

involving a nonmember defendant. Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988), *cert denied*, 490 U.S. 1110 (1989). That is an entirely different posture than tort litigation against a nonmember defendant. And McDonald was a case involving a tort claim against a nonmember defendant that occurred on a tribal road that was Indian fee land. McDonald v. Means, 309 F.3d 530 (9th Cir. 2002). The McDonald court acknowledged that if the land had been non-Indian fee land, the general rule would exempt the road from tribal jurisdiction – tribes lack authority over the conduct on nonmembers on non-Indian fee land within a reservation.

The district-court cases the Longs cite in support of this argument – Malaterre, Fidelity, Warn, and Tom's – are wholly inapposite. Malaterre v. Amerind Risk Mgmt., 373 F. Supp. 2d 980 (D.N.D. 2005); Fidelity & Guarantee Ins. Co. v. Bradley, 212 F. Supp. 2d 163 (W.D.N.C. 2002); Warn v. Eastern Band of Cherokee Indians, 858 F. Supp. 524 (W.D.N.C. 1994); and Tom's Amusement Co., Inc. v. Cuthbertson, 816 F. Supp. 403 (W.D.N.C. 1993). All four are exhaustion cases. None of them firmly establish tribal-court jurisdiction to adjudicate tort claims against a nonmember defendant based on a consensual relationship. Cheromiah, on the other hand, does not even directly address an actual question of tribal-court jurisdiction. Cheromiah v. U.S., 55 F. Supp. 2d 1295 (D.N.M. 1999). It merely analogizes to tribal-court jurisdiction in analyzing a choice-of-law issue. Cheromiah is therefore inapplicable to the present case.

**6. Tribal-court jurisdiction over claims against nonmember defendants arising out of non-Indian fee land – if it even exists – is no broader than necessary to protect tribal self-government or to control internal relations.**

There is no dispute that the land in this case was non-Indian fee land. If neither of the Montana exceptions apply, then the tribal court lacks jurisdiction over the Bank. As the Longs acknowledge, the second exception is inapplicable here. That leaves a narrow but important question for this Court to resolve. Does a tribal court have civil adjudicatory jurisdiction over a nonmember defendant to litigate tort claims as an "other means" of regulating a consensual relationship regarding non-Indian fee land? This Court's decisions in Montana, Strate, and Hicks suggest – but do not definitively resolve – that the tribal court here lacked jurisdiction over the Longs' claim against the Bank.

## CONCLUSION

Plains Commerce Bank respectfully requests that this Court grant its petition for certiorari.

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Dated: December 7, 2007

# JOINT APPENDIX

No. 07-411

FILED

FEB 14 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

# In The Supreme Court of the United States

PLAINS COMMERCE BANK,

*Petitioner,*

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG, LILA LONG,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## JOINT APPENDIX


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**Petition For Writ Of Certiorari Filed September 21, 2007**
**Writ Of Certiorari Granted January 4, 2008**

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February 10, 2000 – Plaintiffs' Demand For Trial By Jury

February 10, 2000 – Reply to Counterclaim

February 18, 2000 – Order Nunc Pro Tunc 07-30-99

September 12, 2002 – Motion for Summary Judgment on Counterclaim

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September 24, 2002 – Plaintiffs' Response in Resistance to Defendant Bank of Hoven's Motion for Summary Judgment

September 24, 2002 – Affidavit of Ronnie Long

September 30, 2002 – Hearing

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November 20, 2002 – Juror List and Questionnaire for Jury Trial Set for Dec. 6, 2002

December 3, 2002 – Motion to Dismiss Several Counts in Complaint to Narrow Issues for Trial

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December 6, 2002 – Proposed Jury Trial Schedule; Jury Questionnaires; Claims for Exemption from Jury Service; Jury Summonses

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March 19, 2003 – Notice of Appeal

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January 15, 2004 – Brief of Respondents-Appellants, Long Family Land And Cattle Company, Inc., Ronnie and Lila Long

January 15, 2004 – Appellant Plains Commerce Bank's Brief

February 27, 2004 – Appellant's Reply Brief

March 1, 2004 – Brief of Respondents, Long Family Land And Cattle Company, Inc., Ronnie and Lila Long

June 17, 2004 – Brief of Amicus Curiae Cheyenne River Sioux Tribe

July 22, 2004 – Appellant's Response to Amicus Curiae Brief of the Cheyenne River Sioux Tribe

September 10, 2004 – Order Setting Oral Argument

October 6, 2004 – Hearing – Oral Argument on Appeal; Tape Recordings

November 22, 2004 – Memorandum Opinion and Order

**United States District Court Docket, No. 05-3002**

January 7, 2005 – Complaint – 3 summons issued – mailed. Receipt Number 300 29237 in the amount of $150 filed by Plains Commerce Bank (Attachments: #(1) Receipt) (DLC) Modified.

January 10, 2005 – Summons Issued as to Lila Long, Ronnie Long, Long Family Land and Cattle Company, Inc. (DLC)

March 11, 2005 – ANSWER to Complaint with Jury Demand *and Affirmative Defenses* by Long Family Land and Cattle Company, Inc., Ronnie Long, Lila Long. (Hurley, James)

December 1, 2005 – Notice of Motion and MOTION for Summary Judgment by Plains Commerce Bank. (JAB)

December 1, 2005 – STATEMENT OF UNCONTESTED AND MATERIAL FACTS in Support of [28] Motion for Summary Judgment by Plaintiff Plains Commerce Bank. (JAB)

December 1, 2005 – MEMORANDUM OF LAW in Support of [28] MOTION for Summary Judgment filed by Plains Commerce Bank. (JAB)

December 1, 2005 – AFFIDAVIT of Charles Simon in Support of Plaintiff's Motion for Summary Judgment. (Attachments: #(1) Exhibit 1 #(2) Exhibit 2 #(3) Exhibit 3 #(4) Exhibit 4 #(5) Exhibit 5 #(6) Exhibit 6 #(7) Exhibit 7 #(8) Exhibit 8 #(9) Exhibit 9 #(10) Exhibit 10 #(11) Exhibit 11 #(12) Exhibit 12 #(13) Exhibit 13 #(14) Exhibit 14 #(15) Exhibit 15 #(16) Exhibit 16 #(17) Exhibit 17 #(18) Exhibit 18 #(19) Exhibit 19 #(20) Exhibit 20 #(21) Exhibit 21 #(22) Exhibit 22 #(23) Exhibit 23 #(24) Exhibit 24 #(25) Exhibit 25) (JAB)

December 1, 2005 – MOTION for Summary Judgment by Long Family Land and Cattle Company, Inc., Ronnie Long, Lila Long. (Hurley, James)

December 1, 2005 – BRIEF by Defendants Long Family Land and Cattle Company, Inc., Ronnie Long, Lila Long re [33] MOTION for Summary Judgment. (Attachments: #(1) Index of Attachments #(2) Attachment 1 #(3) Attachment 2 #(4) Attachment 3 #(5) Attachment 4 #(6) Attachment 5 #(7) Attachment 6 #(8) Attachment 7 #(9) Attachment 8 #(10) Attachment 9 #(11) Attachment 10 #(12) Attachment 11 #(13) Attachment 12 #(14) Attachment 13 #(15) Attachment 14 #(16) Attachment 15 #(17) Attachment 16 #(18) Attachment 17 #(19) Attachment 18 #(20) Attachment 19 #(21) Attachment 20 #(22) Attachment 21 #(23) Attachment 22) (Hurley, James)

December 9, 2005 – AFFIDAVIT of Ronnie and Lila Long re [36] Brief, [33] MOTION for Summary Judgment, [34] Statement of Material Facts. (Hurley, James)

December 22, 2005 – RESPONSE to [34] Statement of Material Facts filed by Plains Commerce Bank. (SRN)

December 22, 2005 – SECOND AFFIDAVIT of Charles Simon. (SRN)

December 22, 2005 – MEMORANDUM in Opposition re [33] MOTION for Summary Judgment filed by Plains Commerce Bank. (SRN)

December 22, 2005 – AFFIDAVIT of Thomas J. Van Norman re [44] Notice *Affidavit of Thomas J. Van Norman*. (Attachments: #(1) Exhibit Exhibit A #(2) Exhibit Exhibit B #(3) Exhibit Exhibit C #(4) Exhibit Exhibit D #(5) Exhibit Exhibit E #(6) Exhibit Exhibit F #(7) Exhibit Exhibit G #(8) Exhibit Exhibit H #(9) Exhibit Exhibit I #(10) Exhibit Exhibit J #(11) Exhibit Exhibit K) (Hurley, James)

December 22, 2005 – BRIEF by Amicus Cheyenne River Sioux Tribe *Brief Of Amicus Curiae Cheyenne River Sioux Tribe Submitted For Consideration With The Parties' Cross-Motions for Summary Judgment*. (Gunn, Steve)

December 22, 2005 – RESPONSE to [29] Statement of Material Facts filed by Long Family Land and Cattle Company, Inc., Ronnie Long, Lila Long. (Hurley, James)

December 22, 2005 – BRIEF by Defendants Long Family Land and Cattle Company, Inc., Ronnie Long, Lila Long re [30] Memorandum in Support of Motion *for Summary Judgment*. (Hurley, James)

December 22, 2005 – AFFIDAVIT of Ronnie and Lila Long re [49] Notice *of Filing*. (Attachments: #(1) Attachment-Index #(2) Attachment-Security Agreement #(3) Attachment-Guaranty 4-1-97 #(4) Attachment-Guaranty 9-28-88 #(5) Attachment-Guaranty 3-5-92 #(6) Attachment-Mortgage 9-20-88 #(7) Attachment-Mortgage 11-15-90 #(8) Attachment-Mortgage 3-5-92 #(9) Attachment-Bank's Mot. SJ Tribal Court #(10) Attachment-Appellate Court Tr. Pages #(11) Attachment-CRST Transcript pages #(12) Attachment-Index Attach. Def. Brief MSJ) (Hurley, James)

January 12, 2006 – REPLY MEMORANDUM OF LAW in Support of [33] MOTION for Summary Judgment filed by Plains Commerce Bank. (JAB)

January 12, 2006 – AFFIDAVIT of Ronnie and Lila Long re [54] Notice. (Attachments: #(1) Exhibit Index of Attachments to Third Affidavit #(2) Exhibit BIA Guarantees of Bank loans to Long & related correspondence & pmts. #(3) Exhibit CFR 103.22 #(4) Exhibit Letter dated 11/1/96 from Bank to CRST Credit Officer, Lemke #(5) Exhibit Letter dated 12/12/96 from Bank to McClure & cash flow of 12/11/96 & cash flow by Huber of 10/29/96 #(6) Exhibit Money loaned to Longs 12/12/96 to 2/12/97 #(7) Exhibit Plf.'s claimed Damages. Def.'s claimed Damages #(8) Exhibit Notes & Computations #(9) Exhibit Annual FSA Farm Program Pmts. #(10) Exhibit CRST Law & Order Code Ch. IV, Jurisdiction #(11) Exhibit CFR 103.2, Purpose of BIA guaranty loan program #(12) Exhibit Trial Transcript pages #(13) Exhibit Letter dated 9/4/02 from McClure to Longs) (Hurley, James)

January 12, 2006 – MEMORANDUM in Support re [33] MOTION for Summary Judgment *and in Resistance to Plaintiff's Motion for Summary Judgment* filed by Long Family Land and Cattle Company, Inc., Ronnie Long, Lila Long. (Hurley, James)

July 17, 2006 – MEMORANDUM OPINION AND ORDER denying [28] Motion for Summary Judgment, granting [33] Motion for Summary Judgment. Signed by Charles B. Kornmann on 7/17/06. (SRN)

August 11, 2006 – NOTICE OF APPEAL as to [64] Order on Motion for Summary Judgment, by Plains Commerce Bank. Filing fee $455. (JAB) Additional attachment(s) added on 8/14/2006 (JAB).

August 18, 2006 – USCA Case Number 06-3093 for [66] Notice of Appeal filed by Plains Commerce Bank. (SRN)

July 3, 2007 – OPINION of USCA as to [66] Notice of Appeal filed by Plains Commerce Bank (MWT)

July 3, 2007 – JUDGMENT of USCA Affirming the judgment of the District Court as to [66] Notice of Appeal filed by Plains Commerce Bank (MWT)

July 20, 2007 – MANDATE from the 8th Circuit COA affirming the decision of the District Court as to [66] Notice of Appeal filed by Plains Commerce Bank (DLC)

October 5, 2007 – Letter re: Writ of Certiorari (JAB)

**Eighth Circuit Court of Appeals Docket, No. 06-3093**

August 18, 2006 – Civil Case Docketed. Dist. Ct. Office: Pierre

August 18, 2006 – CERTIFIED copies of notice of appeal, docket entries, memorandum and opinion and order dated 7/17/06 granting defendants' motion for summary judgment [06-3093] [2079622]

October 23, 2006 – BRIEF FILED – Brief of Appellant – Plains Commerce Bank 9,439 words w/addendum 10 copies – w/service 10/18/06 w/cd. [06-3093] [2102963]

October 23, 2006 – RECORDS received: Appendix filed by Appellant Plains Commerce Bank consisting of 1 Volume, 3 Copies. [06-3093]

December 6, 2006 – BRIEF FILED – Brief of Appellee – Long Family Land and [sic], Ronnie Long, Lila Long. 13,991 words – 10 copies – w/service 12/1/06. w/cd [06-3093] [2116662]

December 6, 2006 – RECORDS received: Appendix filed by Appellees Long Family Land et. Al., and consisting of 1 Volume(s), 3 Copies. [06-3093]

January 17, 2007 – BRIEF FILED – AMICUS BRIEF filed by Cheyenne River Sioux Tribe w/service 12/15/2006 39PDF pages w/Addendum, 10 copies, Words/lines/pages:30 pages. [3268243-] [06-3093]

January 18, 2007 – BRIEF FILED – APPELLANT REPLY BRIEF filed by Plains Commerce Bank, w/service 01/16/2007. 34 PDF pages No Addendum, 10 copies, Words/lines/pages:18. [3269721-1] [06-3093]

March 12, 2007 – ARGUED & SUBMITTED in University of St. Thomas to Judges Roger L. Wollman; John R. Gibson; Diana E. Murphy[;] Mr. Thomas James Van Norman for Amicus on Behalf of Appellee Cheyenne River Sioux Tribe, Mr. Paul Anthony Banker for Appellant Plains Commerce Bank and Mr. James Philip Hurley for Appellees Lila Long, Long Family Land and Tile Company [sic] and Ronnie Long. Rebuttal by Mr. Paul Anthony Banker for Plains Commerce Bank RECORDED [3287495] [06-3093]

June 26, 2007 – OPINION FILED – THE COURT: ROGER L. WOLLMAN; JOHN R. BIGSON; DIANA E. MURPHY. Diana E. Murphy, Authoring Judge (PUBLISHED) [3322826] [06-3093]

June 26, 2007 – OPINION FILED – The judgment of the Originating Court is AFFIRMED in accordance with the opinion. ROGER L. WOLLMAN; JOHN R. BIGSON; DIANA E. MURPHY. Hrg Mar 2007 [3322835] [06-3093]

July 18, 2007 – MANDATE ISSUED. [06-3093]

October 3, 2007 – U.S. Supreme Court Notice of cert filed. Supreme Court Case Number: 07-411, Filed Date: 09/21/2007 [3358503] [06-3093]

**No. 05-3002**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

Plains Commerce Bank

v.

Long Family Land & Cattle Co., *et al.*

(reported at 440 F. Supp. 2d 1070 (D.S.D. 2006))

The following documents were submitted
as attachments or exhibits in this Court.

[EXHIBIT 1]

STATE OF SOUTH DAKOTA

[SEAL]

OFFICE OF
THE SECRETARY OF STATE

***Certificate Of Incorporation***
***Business Corporation***

I, JOYCE HAZELTINE, Secretary of State of the State of South Dakota, hereby certify that duplicate originals of the Articles of Incorporation of LONG FAMILY LAND AND CATTLE COMPANY, INC. duly signed and verified, pursuant to the provisions of the South Dakota Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I hereby issue this Certificate of Incorporation of LONG FAMILY LAND AND CATTLE COMPANY, INC. and attach hereto a duplicate original of the Articles of Incorporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of South Dakota, at Pierre, the Capital, this 24th day of March A.D. 1987

/s/ Joyce Hazeltine
Secretary of State

Deputy

Filed this 24th day of
March, 1987

/s/ Joyce Hazeltine
SECRETARY OF STATE

# ARTICLES OF INCORPORATION
# OF
# LONG FAMILY LAND AND CATTLE COMPANY, INC.

Executed by the undersigned for the purpose of forming a SD Corporation under the provisions of the SD Business Corporation Act. SDCL 47-2.

## ARTICLE I.

The name of the corporation is Long Family Land and Cattle Company, Inc.

## ARTICLE II.

The period of existence of said corporation is perpetual.

## ARTICLE III.

The purpose for which this corporation is formed shall be:

(a) To engage in a general livestock, ranching and farming business, to feed, to range, graze, manage, herd, control, brand, care for, purchase, market and sell livestock of every kind and cultivate land;

(b) To purchase and operate retail establishments, to buy, improve, develop, lease, exchange, sell, dispose of, mortgage and otherwise deal-in real and personal property.

(c) To purchase, lease, build, construct, erect, occupy and manage buildings and machinery and personal property necessary to the objects of the business;

(d) To borrow money and issue evidences of indebtedness in furtherance of any or all of the objects of the business; to secure the same by mortgage, pledge or other lien;

(e) To enter into any kind of activity, to have all of the powers of the South Dakota Business Corporation Act, and to perform and carry out contracts of any kind necessary to, or in connection with, or incidental to the accomplishment of the purposes of the Corporation.

## ARTICLE IV

The Corporation shall have the authority to issue ONE HUNDRED THOUSAND (100,000) shares of capital stock of said corporation with par value of One Dollar (1.00) per share, for a total authorized capital stock of ONE HUNDRED THOUSAND DOLLARS. ($100,000.)

## ARTICLE V.

The corporation will not commence business until consideration of the value of at least ONE THOUSAND (1,000.00) has been received from the issuance of shares.

## ARTICLE VI.

The Address of its registered office is Post Office Box 272, Timber Lake, South Dakota 57656, and the name of its registered agent at such address is Ronnie Long.

## ARTICLE VII.

The number of directors constituting the Board of Directors are four and the name and address of the directors is as follows:

| | |
|---|---|
| Ronnie Long | Box 272, Timber Lake, South Dakota 57656 |
| Lila Long | Box 272, Timber Lake, South Dakota 57656 |
| Kenneth Long | Box 186, Timber Lake, South Dakota 57656 |
| Maxine Long | Box 186, Timber Lake, South Dakota 57656 |

ARTICLE VIII.

The name and address of the incorporator is as follows:

Ronnie Long, Post Office Box 272, Timber Lake, South Dakota 57656.

ARTICLE IX.

It is the wish of the shareholders and incorporator that the Long Family Land And Cattle Company, Inc. shall be controlled by native Americans who at least at all times own 51% of the outstanding stock in the corporation.

ARTICLE X.

These Articles of Incorporation may be amended in the manner authorized by law at the time of amendment.

EXECUTED IN DUPLICATE ON THIS 23rd DAY, OF March, 1987.

/s/ Ronnie Long
Ronnie Long

STATE OF SOUTH DAKOTA

COUNTY OF DEWEY

On this 23rd day of March, 1987, before me, the undersigned officer personally appeared Ronnie Long. Known to me to be the person who is described herein, and who executed the within instrument for the purpose therein contained.

IN WITNESS, WHEREOF, I hereunto set my hand and official seal

/s/ Andrew Aberle
NOTARY PUBLIC –
SOUTH DAKOTA
My Commission Expires:
Oct. 15, 1990

-SEAL-

STATE OF SOUTH DAKOTA )
: SS
COUNTY OF DEWEY )

Ronnie Long being first duly sworn on oath deposes and states: That he is the person described in and who signed the foregoing Articles of Incorporation as an incorporator herein; that he has read such articles and knows the contents thereof; that the incorporator intends in good faith to form a corporation for the purposes of the promotion of a lawful business as set forth in said articles and not for the purpose of enabling any corporation or corporations to avoid provisions of 1967 SDCL 37-1 relating to

unlawful trust and combinations and laws amendatory therein.

/s/ Ronnie Long
Ronnie Long

Subscribed and sworn to before me this 23rd day of March, 1987.

/s/ Andrew Aberle
Andrew Aberle,
Notary Public, South Dakota

My Commission Expires: 10/15/90

(SEAL)

Receipt No. C50002

File No. DB-26,227

**Filed at Request of**
Ronnie Long
Box 272
Timber Lake, SD 57656

ARTICLES OF INCORPORATION OF

LONG FAMILY LAND AND CATTLE COMPANY, INC.

100,000 shares, $1 par value
$100,000.00

State Of South Dakota

ss.

Office of Secretary of State

Filed in the office of the Secretary of State on the 24th day of March 1987.

/s/ Joyce Hazeltine
Secretary of State

By _____
Deputy

Fee Received $60

**SOS CRP 491 4/81**

## [ATTACHMENT 3]

## GUARANTY

In consideration of financial accomodations [sic] given or to be given or continued to Maxine Long, herein called "Borrower" by Bank of Hoven, A SD Corporation herein called "Bank", the undersigned irrevocably and unconditionally guarantee to the Bank, payment when due, whether by acceleration or otherwise, of any and all Liabilities of the Borrower as defined below to the Bank, together with all interest thereon; all attorneys' fees, costs, and expenses of collection incurred by the Bank in enforcing any of such Liabilities of the Borrower; and all attorneys' fees, costs, and expenses incurred by the Bank in foreclosing, preserving, protecting, retaking, holding, and selling of any collateral as a result of the enforcement or foreclosure of any security interest or mortgage given by Borrower to Bank.

The term "Liabilities of the Borrower" shall mean and include:

A. ☐ if checked, all indebtedness, liabilities or obligations, direct or contingent, secured or unsecured, joint, several, or joint and several, of the Borrower to Bank, created or incurred for any purpose whatsoever, now existing or hereafter arising, due or to become due to, or held or to be held, by the Bank for its own account or as agent for another or others, whether created or incurred directly or acquired by assignment or otherwise. (THERE IS NOT

A LIMIT TO THE AMOUNTS COVERED BY THIS GUARANTY).

B. ☒ if checked, the debts, liabilities, or obligations, direct or contingent, secured or unsecured, joint, several, or joint or several of the Borrower to Bank evidenced by the following: subject to terms of collateral note and any extensions, renewals, modifications or replacements thereof. (THIS GUARANTY IS LIMITED TO $322,967.26).

The undersigned waive notice of the following: acceptance of this Guaranty and notice of the incurring of any of the Liabilities of the borrower; presentment, demand for payment, protest, notice of protest, notice of dishonor or nonpayment of any instrument evidencing any of the Liabilities of the Borrower; notice of any alleged default, or notice of right to cure any default with respect to any of the Liabilities of the Borrower to the Bank; and notice of any lawsuit filed by or on behalf of the Bank against Borrower, or the taking of any other action by the Bank against, and any other notice to, any party liable for any of the Liabilities of Borrower (including the undersigned).

The Bank may at any time and from time to time (whether or not after revocation or termination of this Guaranty) without the consent of, or notice to, the undersigned; without incurring responsibility to the undersigned; and without impairing or releasing the obligations of the undersigned hereunder, do one or more of the following:

(1) renew, alter, or change in any manner the terms of any instrument evidencing any of the Liabilities of the Borrower, including any change in a) the rate of interest, and b) place, terms, or time of payment of any debt, liability, or obligation incurred directly or indirectly in respect thereof. This Guaranty shall apply to the Liabilities of the Borrower to the Bank as so changed, extended, renewed, or altered;

(2) sell, exchange, substitute, release, surrender, realize upon, or otherwise deal with in any manner and in any order any property by whomsoever at any time pledged, mortgaged, or otherwise securing any of the Liabilities of the Borrower to the Bank hereby guaranteed or any debts, liabilities or obligations (including any of those hereunder) incurred directly or indirectly in respect thereof or hereof, and/or exercise any right of setoff it may have.

(3) exercise or refrain from exercising any rights against the Borrower or others (including the undersigned) or otherwise act or refrain from acting:

(4) settle or compromise any of the Liabilities of the Borrower to the Bank hereby guaranteed or any security therefor, or any debt, liability, or obligation (including any of those thereunder) incurred directly or indirectly in respect thereof or hereof, and may subordinate the payment of all or any part of the Liabilities of the Borrower to the payment of any debt, liability, or obligation (whether due or not) of

the Borrower to creditors of the Borrower other than the Bank and the undersigned; and

(5) apply any sums by whomsoever paid or howsoever realized to any Liabilities of the Borrower (regardless of the origin thereof) to the Bank, regardless of the nature of any of the Liabilities of the Borrower to the Bank which remain unpaid and regardless of the Borrowers' application or use of the consideration, if any, received in connection with any of the Liabilities of the Borrower to the Bank.

No invalidity, irregularity, or unenforceability of all or any part of the Liabilities of the Borrower to the Bank hereby guaranteed, or in any of the documents securing all or any part of the Liabilities of the Borrower, shall affect, impair, or be a defense to this Guaranty, and this Guaranty is a primary obligation of the undersigned.

The undersigned agree that the obligations and guaranty of the undersigned and the rights of the Bank in any collateral by whomsoever at any time pledged, conveyed, or mortgaged to secure, or howsoever securing any of the liabilities of the Borrower, shall not be released, discharged, or in any way affected, nor shall the undersigned have any rights against the Bank, by reason of the fact that (i) a valid or perfected lien, security interest, or encumbrance in any of the collateral may not be conveyed to, obtained by, or created in favor of Bank; (ii) any of the collateral may be subject to equities or defenses or claims in favor of others or may be invalid or defective in any

way; (iii) the value of any of the collateral, or the financial condition of the Borrower, of any obligor, of any guarantor, or any of the collateral may not have been correctly estimated or may have changed or may hereafter change; or (iv) there is any deterioration, waste, or loss by fire, theft, or otherwise of any of the collateral.

The undersigned agree that the Bank shall not be required to resort first for payment to the Borrower, or other persons or corporations, their properties or estates, whether by lawsuit or otherwise, before enforcing this Guaranty. The undersigned further agree that Bank shall not be required to have any collateral or security applied to Liabilities of the Borrower (including other guaranties) before enforcing this Guaranty. The undersigned further agree that the Bank shall have a general lien on and security interest in and a right of setoff against all property of the undersigned including without limitation all deposits, cash, securities, notes, cash equivalents, or certificates of deposit now or hereafter in the Bank's possession or on deposit with the Bank, whether held in a general or special acount [sic], or for safekeeping or otherwise, and such lien, security interest, and right of setoff may be enforced or exercised without demand upon or notice to the undersigned.

If box A is checked above, this Guaranty is a continuing one and all of the Liabilities of the Borrower to the Bank to which it applies or may apply under the terms hereof shall be conclusively presumed

to have been created in reliance hereon. As to each of the undersigned, this Guaranty shall continue until written notice of revocation signed by such undersigned, or until written notice of the death of such undersigned shall in each case have been actually received by the Bank, notwithstanding revocation by, or the death of, or complete or partial release for any cause of, any one or more of the remainder of the undersigned, or of the Borrower, or of anyone liable or obligated in any manner for any of the Liabilities of the Borrower hereby guaranteed or for the debts, liabilities, or obligations (including those hereunder) incurred directly or indirectly in respect thereof or hereof. No revocation or termination hereof shall affect in any manner rights arising under this Guaranty with respect to (a) Liabilities of the Borrower to the Bank which shall have been created, contracted, assumed, or incurred prior to receipt by the Bank of written notice of such revocation or termination or (b) Liabilities of the Borrower to the Bank which shall have been created, contracted, assumed, or incurred after receipt of such written notice pursuant to any contract entered into by the Bank prior to receipt of such notice; and the sole effect of revocation or termination hereof shall be to exclude from this Guaranty Liabilities of the Borrower to the Bank thereafter arising which are unconnected with Liabilities of the Borrower to the Bank arising or transactions entered into before the date of revocation or termination.

If claim is ever made upon the Bank for repayment or recovery of any amount or amounts

received by the Bank in payment or on account of any of the Liabilities of the Borrower to the Bank and the Bank repays all or part of said amount by reason of (a) any judgment, decree, or order of any court or administrative body having jurisdiction over the Bank or any of its property, or (b) any settlement or compromise of any such claim effected by the Bank with any such claimant (including the Borrower), then and in such event the undersigned agree that any such judgment, decree, order, settlement, or compromise shall be binding upon the undersigned, notwithstanding any revocation hereof or the cancellation of any note or other instrument evidencing any of the Liabilities of the Borrower to the Bank, and the undersigned shall be and remain liable to the Bank hereunder for the amount so repaid or recovered to the same extent as if such amount had never originally been received by the Bank.

Any acknowledgment or new promise, whether by payment of principal or interest or otherwise and whether by the Borrower or others (including the undersigned), with respect to any of the Liabilities of the Borrower to the Bank shall, if the statute of limitations in favor of the undersigned against the Bank shall have commenced to run, toll the running of such statute of limitations and, if the period of such statute of limitations shall have expired, prevent the operation of such statute of limitations.

No delay on the part of the Bank in exercising any of its options, powers, or rights, or partial or single exercise thereof, shall constitute a waiver

thereof. No waiver of any of its rights hereunder, and no modification or amendment of this Guaranty, shall be deemed to be made by the Bank unless the same shall be in writing, duly signed on behalf of the Bank, and each such waiver, if any, shall apply only with respect to the specific instance involved, and shall in no way impair the rights of the Bank or the obligations of the undersigned to the Bank in any other respect at any other time.

The undersigned waive all rights of subrogation to Bank's rights against the Borrower until all of the Liabilities of the Borrower to the Bank guaranteed hereunder shall have been fully paid and discharged.

This Guaranty and the rights and obligations of the Bank and of the undersigned hereunder shall be govered [sic] and construed in accordance with the laws of the State of South Dakota; and this Guaranty is binding upon the undersigned, his, her, their, or its executors, administrators, successors, or assigns, and shall inure to the benefit of the Bank, its successors, or assigns.

The undersigned, if more than one, shall be jointly and severally liable hereunder and the term "undersigned" wherever used herein shall mean the undersigned or any one or more of them. Anyone signing this Guaranty shall be bound hereby, whether or not anyone else signs this Guaranty at any time. The term "Bank" includes any agent of the Bank acting for it.

If any of the provisions of this Guaranty shall contravene or be held invalid under the laws of the applicable jurisdiction, this Guaranty shall be construed as if not containing those provisions and the rights and obligations of the parties shall be construed and enforced accordingly.

In addition to the other provisions contained herein, this Guaranty is secured by _____.

Dated: September 28, 1988.

/s/ Maxine Long
Maxine Long

Box 186, Timber Lake, SD 57656
(Address)

_____
_____
(Address)

**INDIVIDUAL ACKNOWLEDGEMENT**

State of South Dakota )
) ss.
County of Potter )

On this 28 day of September, 1988, before me, a Notary Public, personally appeared Maxine Long, to me known to be the identical person(s) who executed the foregoing instrument, and it is executed as a voluntary act and deed.

/s/ Nancy K. Rausch
Notary Public

My Commission expires:

NANCY K. RAUSCH
Notary Public, POTTER
COUNTY, S. DAK.
My Commission Expires
APRIL 10, 1993

## CORPORATE ACKNOWLEDGEMENT

State of _____ )
) ss.
County of _____ )

On this _____ day of _____, 19___, before me, a Notary Public, personally appeared _____, to me personally known, who being by me duly sworn did say that he/she is the _____ of _____, a Corporation; that the seal affixed to the instrument is the seal of said Corporation (or that no seal has been provided by said Corporation); that said seal was signed (and sealed) on behalf of said Corporation by authority of its Board of Directors; and the said _____ acknowledged the execution of said instrument to be the voluntary act and deed of said Corporation.

_____
Notary Public

My Commission expires: _____

## [ATTACHMENT 5]

**COLLATERAL REAL ESTATE MORTGAGE – [ILLEGIBLE]**

## MORTGAGE – COLLATERAL REAL ESTATE MORTGAGE

*THIS MORTGAGE, made this* 28th *day of* September *in the year 19* 88 *, by* Kenneth and Maxine Long, Husband and Wife

*of* Dewey *County and State of* South Dakota *Mortgagor* s *to* Bank of Hoven, A South Dakota Corporation, Box 7 *of* Hoven *P. O., County of* Potter *and state of* South Dakota *, Mortgagee* ;

*WITNESSETH, that said Mortgagor* s *hereby mortgage* *to said Mortgagee* *the following described premises situated in the County of* Dewey *and State of South Dakota, to wit:* Lot 7 and South 40' of Lot 8, Block 29, in the Town (now City) of Timber Lake, Dewey County, South Dakota, together with carpets, drapes, T.V. and C.B. antennae and refrigerator.

*as security for the payment to said mortgagee* *at* Hoven, South Dakota *of a principal sum not to exceed* $ 322,967.26 *in accordance with promissory notes, credit agreements, checks, or any other indebtedness or commitments between Mortgagor and Mortgagee, whether or not evidenced by a written instrument or agreement, and whether or not the same exists as of the date hereof, or*

*is hereafter created or acquired by Mortgagee; all such indebtedness and commitments being hereinafter referred to as the "Obligations," said Obligations not to be in excess of $ 322,967.26 , but nothing herein shall be considered as limiting the amounts which shall be secured when advanced to protect the security.*

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*THE PARTIES AGREE THAT THIS MORTGAGE CONSTITUTES A COLLATERAL REAL ESTATE MORTGAGE PURSUANT TO SDCL 44-8-26.*

*This Mortgage shall, notwithstanding the fact that from time to time during the term hereof no indebtedness shall be due from Mortgagor to Mortgagee, constitute a continuing lien against the Property for the amount stated herein. If at any time the indebtedness due Mortgagee is zero, the Mortgagee shall, within ten days after receipt of written demand therefor by Mortgagor, execute and record a satisfaction of this Mortgage.*

*The original term of this Mortgage is five years unless such term is extended by the filing of an Addendum to this Mortgage. Any addendum to this Mortgage need be signed only by the Mortgagee. Upon the timely filing of such an addendum to this Mortgage, the effectiveness hereof shall be continued for five years after the date of filing this Mortgage whereupon it shall lapse unless another addendum to this Mortgage continuing the effectiveness of its lien is*

*filed prior to such lapse. Succeeding addendums to this Mortgage may be filed in the same manner to continue the effectiveness of the lien hereof.*

*SAID MORTGAGOR* s *further agree* ___ *to pay all taxes and assessments that may be levied upon said premises, before the same shall become delinquent (and to keep the buildings, if any, upon said premises safely insured for the benefit of said Mortgagee* ___ *in the sum of* $ 50,000.00 *Dollars against loss by fire* _____ *and deliver the insurance policies to said Mortgagee* ___*).*

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## [ATTACHMENT 1]

## SECURITY AGREEMENT - GENERAL FORM

September 28, 19 88

1. PARTIES - PROPERTY: The undersigned Debtor (jointly and severally) for value received hereby grants to the undersigned Secured Party or Lender, a security interest in the following described property:

All equipment, all machinery, all farm vehicles, all crops, all feed and grain; all livestock, all supplies used or produced in farming operations, all contract rights and accounts, all warehouse receipts or other documents of title affecting such goods, and all rights of debtor or payments in kind and ASCS farm program payments under the terms set between the debtor and the U.S. Dept. of Ag., whether now owned or hereafter acquired.

all products of, additions to and replacements thereof and all accessories, occassions [sic], parts and equipment now or hereafter affixed thereto or used in connection therewith, and the proceeds of all property secured hereby as set out below.

2. IF FARM PRODUCTS, CROPS OR FIXTURES ARE COLLATERAL: If this instrument includes livestock, then as additional collateral, Debtor assigns, transfers and conveys to Secured Party a security interest in and to all increase and issue thereof and additions, replacements and substitutions therefor, and all feed, both hay and grain,

owned by Debtor, all water privileges, and all equipment, used in feeding and handling said livestock and also all of Debtor's right, title and interest in all leases covering lands for pasture and grazing purposes. If crops, this agreement includes annual and perennial crops and products thereof growing or planted on the following described property; either before or after harvest and all additions and substitutions therefor; or if the property covered hereby is livestock, crops or fixtures, it is and will be located on the following described property in _____ County, South Dakota:

3. IF INVENTORY IS COLLATERAL: If this instrument includes inventory then Debtor hereby grants to Lender, a security interest in all of his inventory now owned or hereafter acquired and all replacements, substitutions, and additions thereto, and a security interest in all of Debtor's merchandise, raw materials, work in process and finished products.

A. Upon execution of this agreement and upon request of Secured Party at any time while the indebtedness hereby secured remains unpaid, Debtor will furnish to Secured party a signed statement, in form satisfactory to Secured Party, showing the current status of the inventory herein secured to include for any given period designated by Secured Party the opening inventory, inventory acquired, inventory sold and delivered, inventory sold and held for future delivery, inventory returned or repossessed, inventory used or consumed in Debtor's business, and closing inventory.

B. If at any given time the value of the collateral does not equal or exceed the total amount of indebtedness of Debtor to Secured Party, debtor shall at once pay the excess of indebtedness to Secured Party or transfer additional collateral to Secured Party to meet Secured Party's satisfaction.

4. OBLIGATIONS SECURED – OPEN END: This security interest is given to secure the performance of the covenants and agreements herein set forth and for the payment of an indebtedness in the face amount of $_____ as evidenced by a promissory note(s) or other instrument(s) executed by Debtor payable to the order of said Secured Party as therein provided, and with interest as therein set forth and for the payment of all extensions and renewals thereof and all changes in form of said indebtedness which may be from time to time effected by agreement between Secured Party and Debtor, and for all advances made by Secured Party for taxes, levies, premiums of insurance and repairs to or maintenance of said collateral or to protect or preserve the collateral against the claims of others and all money heretofore and hereafter advanced by Secured Party at his option to or for the account of Debtor and all other present or future, direct or contingent liabilities of Debtor to Secured Party of any nature whatsoever and however arising or acquired; and for interest on any money expanded by Secured Party for taxes, levies and repairs to or maintenance of said collateral. All sums payable hereunder shall be paid at the place stated in the

promissory note or instrument, if any, and if none then at the location, of the Secured Party as stated below, and if none, then or the place of residence of the Secured Party.

5. This instrument shall be void upon payment of all obligations secured hereby.

6. INFORMATIONAL (check one or more)

☐ The address of the Debtor, below, is his residence.

☒ Such address is the Debtors chief place of business.

☐ Such address is where the Collateral is kept.

☐ Debtor is a non-resident of South Dakota.

7. USE OF PROPERTY: Debtor warrants, covenants and agrees that, the property is or is to be used by Debtor primarily (check 1, 2 or 3),

1. In business
   ☐ Equipment ☐ Inventory

2. For personal, family or household purposes;

3. In farming operations.
   ☒ Farm Products ☒ Farm Equipment

8. PURPOSE: The security interest herein is given on this collateral

☒ for a purchase money loan; ☐ otherwise,

9. THIS AGREEMENT SPECIFICALLY INCLUDES ALL OF THE ADDITIONAL PROVISIONS SET FORTH ON THE REVERSE SIDE HEREOF, THE SAME BEING INCORPORATED HEREIN BY

REFERENCE. DEBTOR ACKNOWLEDGES RECEIPT OF A COPY OF THIS CONTRACT FULLY COMPLETED.

BANK OF HOVEN
HOVEN, SOUTH DAKOTA 57450

By /s/ Don Bohr
Don Bohr, VP (Secured Party)

/s/ Kenneth Long
Kenneth Long (Debtor)

/s/ Maxine Long
Maxine Long (Debtor)

/s/ Ronnie Long
Ronnie Long (Debtor)

/s/ Lila Long
Lila Long (Debtor)

(Number of Street)

Box 186 Timber Lake, SD
(City)

Dewey South Dakota
(County) (State)

*Consider the desirability of joinder of spouse.

[ATTACHMENT 1]

**UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF INDIAN AFFAIRS**

**LOAN GUARANTY CERTIFICATE**

Form 5-4756
(April 1975)

Certificate No. A018700038

Long Family Land & Cattle Co. Inc.
Borrower (Last Name First)

Property Address

Timber Lake, South Dakota 57656
City State & Zip Code

Lender – Name & Address

Dewey County Bank
Box 129
Timber Lake, South Dakota 57656

Date March 27, 1987

| | | |
|---|---|---|
| Loan Amount | $350,000 | |
| Percent of Loan Guaranteed | 80 | % |
| Interest Subsidy Rate [to Vary] | 2¾ | % |
| Premium Rate | ½ of 1 | % |

This certificate is evidence of the loan described herein being guaranteed under the Indian Financing Act of 1974 (25 U.S.C. § 1451 et seq.) and the regulations of the Department of the Interior (25 CFR § 93 et seq.). If assigned, endorse on reverse and notify

Commissioner as required in the Guarantee Agreement.

BUREAU OF INDIAN AFFAIRS

/s/ [Illegible] 3/27/87
~~Commissioner of Indian Affairs~~
Assistant Area Director, Indian Programs per delegated authority by Area Director BIA, AAO, Aberdeen, S. Dak. per delegated authority by WO memorandum dated 12/8/86.

Per letter dated September 14, 1998 addressed to Don Bohr of Bank of Hoven from Jerry L. Jaeger, Area Director BIA, Dewey County Bank hereby release all rights, titles, and interests of Kenneth Long, Maxine Long, Ronnie Long and Lila Long, DBA Long Family Land and Cattle Co., Inc. to Bank of Hoven.

9-28-88 /s/ Eugene Christensen
Date Eugene Christensen, Exec. VP
Dewey County Bank

[ATTACHMENT 1]

**UNITED STATES DEPARTMENT OF THE INTERIOR**
**BUREAU OF INDIAN AFFAIRS**
**NOTICE OF ACQUISITION OF LOAN**

Form 5-4756
(April 1975)

To: Russell McClure
Superintendent
Cheyenne River Sioux Tribes
Agency
Eagle Butte, SD 57625
Address
Zip Code

Long Land & Cattle Co.
Borrower
Timber Lake, SD 57656
Address
Zip Code

Seller:
Dewey Co. Bank
Name
Timber Lake, SD 57656
Address
Zip Code

Purchaser:
Bank of Hoven
Name
Hoven, SD 57450
Address
Zip Code

A018700038 3-27-87
Guaranty Certificate No. & Date I.D. No.

9-28-88 46-0108210
Date of Purchase I.D. No.

| Original Amount of Loan | Balance Due Date | Balance Due Amount | Accrued Unpaid Interest | Guaranty Prem. Rate | Interest Subsidy Rate |
|---|---|---|---|---|---|
| $350,000.00 | 10-18-88 | $322,967.26 | $35,699.77 | 2¼ V Above NY Prime | 2¾ V |

Security Acquired:
All cattle and increases, machinery, all feed, grain, hay, horses, 2nd mortgage on residence in Timber Lake, SD.

The undersigned has read and agrees to comply with the applicable provisions of P.L. 93-262 and 25 CFR 93, and further certifies that it is subject to examination and supervision by an agency of the United States, a State or District of Columbia.

Bank of Hoven
Purchaser
By /s/ Don Bohr
Title Asst. Vice Pres.

ACKNOWLEDGEMENT

Receipt, Notice of Acquisition of Loan is hereby acknowledged.

BUREAU OF INDIAN AFFAIRS
By /s/ [Illegible]
Acting Assistant Area Director, Indian Program
Title

10-26-88
Date

**[ATTACHMENT 6]**

**MORTGAGE - COLLATERAL**
**REAL ESTATE MORTGAGE**

*THIS MORTGAGE made this* 15th *day of* November *in the year 1990 by* Kenneth and Maxine Long, Husband and Wife *of* Dewey *County and State of* South Dakota *Mortgagor* s, *to* Bank of Hoven, A Corporation, Box 7 *of* Hoven *P. O., County of* Potter *and state of* South Dakota, *Mortgage* _____.

*WITNESSETH, that said Mortgagor* s *hereby mortgage* _____ *to said Mortgagee* _____ *the following described premises situated in the County of* Dewey *and State of South Dakota, to-wit:* Northwest Quarter of Section Twenty Five, Township Seventeen, Range Twenty Five (NW¼ 25-17-25), All of Section Twenty Eight Township Seventeen, Range Twenty Five (28-17-25), East Half of Section Thirty Two, Township Seventeen, Range Twenty Five (E½ 32-17-25). All of Section Thirty Three, Township Seventeen, Range Twenty Five (33-17-25), and the Southwest Quarter of Section Thirty Four, Township Seventeen, Range Twnety-Five (SW¼ 34-17-25) all in Dewey County, South Dakota, And the East Half of Section One, Township Fifteen, Range Twenty Four (E½ 1-15-24), All in Dewey County, South Dakota. *as security for the payment to said mortgagee* _____ *at* Hoven, South Dakota *of a principal sum not to exceed* $472,275.00, *in accordance with promissory notes, credit agreements, checks, or any other indebtedness or commitments between Mortgagor and Mortgagee, whether or*

*not evidenced by a written instrument or agreement, and whether or not the same exists as of the date hereof, or is hereafter created or acquired by Mortgagee; all such indebtedness and commitments being hereinafter referred to as the Obligations, said Obligations not to be in excess of* $472,275.00, *but nothing herein shall be considered as limiting the amounts which shall be secured when advanced to protect the security.*

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*THE PARTIES AGREE THAT THIS MORTGAGE CONSTITUTES A COLLATERAL REAL ESTATE MORTGAGE PURSUANT TO SDCL 44-8-26.*

*This Mortgage shall, notwithstanding the fact that from time to time during the term hereof no indebtedness shall be due from Mortgagor to Mortgagee, constitute a continuing lien against the Property for the amount stated herein. If at any time the indebtedness due Mortgagee is zero, the Mortgagee shall, within ten days after receipt of written demand therefor* [sic] *by Mortgagor, execute and record a satisfaction of this Mortgage.*

*The original term of this Mortgage is five years unless such term is extended by the filing of an Addendum to this Mortgage. Any addendum to this Mortgage need be signed only by the Mortgagee. Upon the timely filing of such an addendum to this Mortgage, the effectiveness hereof shall be continued for five years after the date of filing this Mortgage whereupon it*

*shall lapse unless another addendum to this Mortgage continuing the effectiveness of its lien is filed prior to such lapse. Succeeding addendums to this Mortgage may be filed in the same manner to continue the effectiveness of the lien hereof.*

*In case of default in the payment of said principal sum of money or any part thereof, or interest thereon at the time or times above specified for payment thereof, or in case of non-payment of any taxes, assessments, or insurance as aforesaid, or of breach of any covenant or agreement herein contained, then and in either case, the whole, principal and interest, of said note ___ shall at the option of the holder thereof, immediately become due and payable, and this mortgage may be foreclosed by action, or by advertisement as provided by statute or the rules of practice relating thereto, and this paragraph shall be deemed as authorizing and constituting a power of sale as mentioned in said statutes or rules, and any amendatory thereof.*

/s/ Kenneth Long

/s/ Maxine Long

*STATE OF SOUTH DAKOTA* )
) *ss.*
*COUNTY OF* Potter )

*On this the* 15th *day of* November, *19* 90, *before me,* Adele R. Enright, A Notary Public, *the undersigned officer, personally appeared* Kenneth and Maxine Long, Husband and Wife, *known to me or satisfactorily proven to be the person whose name* s are *subscribed to the within instrument and acknowledged that* t hey [sic] *executed the same for the purposes therein contained.*

*In witness whereof I hereunto set my hand and official seal.*

/s/ Adele R. Enright

Notary Public

*Title of Officer*

*Date Commission expires:* 04-30-95

[SEAL]

*No. 62365*

**MORTGAGE**
**COLLATERAL REAL**
**ESTATE MORTGAGE**
**WITH POWER OF SALE**
**STATE FORM**

**TO**

*STATE OF SOUTH DAKOTA* )
) ss.
*County of* Dewey )

*OFFICE OF REGISTER OF DEEDS,*

*Filed for record this* 4th *day of* January, *1991 at* 10:30 *o'clock* a.M., *and recorded in Book* 37 *of Mortgages, on page* 265

/s/ Jean Goldade
*Register of Deeds.*

*Deputy.*

*Fees, $* 5.00

**INDEXED**
**RECORDED**
**COMPARED**

*When recorded return to* _____

[ATTACHMENT 1]

[1/credit /s/ RMC 2/20/92]

FEB 19 1992

Credit

Mr. Tim Gapp
Bank of Hoven
Box 7
Hoven, South Dakota 57450

Dear Mr. Gapp:

We have completed a review of your Bank's BIA Guaranty Modification Request for the Long Family Land and Cattle Company. We are pleased to inform you the Modification has been approved for a 58% Guaranty contingent upon the conditions outlined in the enclosed Attachment.

The conditions do not exactly reflect the Modification request. We have taken the liberty of changing the dollar amounts to conform to our requirements and regulations.

Please review and sign the Attachment and return the original and two copies to the Superintendent, Cheyenne River Agency. Once the conditions have been met and the loan closed, please furnish the Agency Superintendent with three copies of all loan documents. The BIA Guaranty will be effective upon payment of the premium and our receipt of closing documents.

If you have any questions, please feel free to contact Stacey Johnston at (605) 226-7381.

Sincerely,

(SGD) GARY HEITMANN
Acting Assistant Area Director
Indian Programs

Enclosures

cc:
Supt., Cheyenne River Agency, Credit
Washington Office, Financial Assistance, Code 270
Long Family Land/Cattle Co., Timber Lake, SD 57656

[ATTACHMENT 1]

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
ABERDEEN AREA OFFICE
115 FOURTH AVENUE S.E.
ABERDEEN, SOUTH DAKOTA 57401

[SEAL] [LOGO]

IN REPLY REFER TO:
Credit

FEB 26 1992

Mr. Tim Gapp
Bank of Hoven
P.O. Box 7
Hoven, South Dakota 57450

Dear Mr. Gapp:

We have completed a review of your Bank's BIA Guaranty Modification Request for the Long Family Land and Cattle Company. We are pleased to inform you the Modification has been approved for an 84% Guaranty contingent upon the conditions outlined in the enclosed attachment.

Please review and sign the Attachment and return the original and two copies to the Superintendent, Cheyenne River Agency. Once the conditions have been met and the loan closed, please furnish the Agency Superintendent with three copies of all loan documents. The Guaranty will be effective upon our receipt of the premium payment.

If you have any questions, please feel free to contact Stacey Johnston at (605) 226-7381.

Sincerely,

/s/ Donald E. Whitener
Assistant Area Director
Indian Programs

Enclosures

---

Attachment to Form 5-4755
Request for loan Guaranty –
Long Family Land & Cattle Co.
Modification #1

(f). Other Conditions

1. Bank will accept 58% guaranty calculated as follows:

| | | | | |
|---|---|---|---|---|
| Operating Line of Credit | $ 50,000 | 90% | guaranty | 3 yrs |
| 1991 Operating Expenses | 70,350 | 0% | guaranty | 20 yrs |
| Existing real estate loan | 8,336.87 | 0% | guaranty | 20 yrs |
| Cattle Purchases | 85,000 | 90% | guaranty | 20 yrs |
| Accrued Interest | 59,263.46 | 0% | guaranty | 20 yrs |
| Vehicles | 25,000 | 50% | guaranty | 20 years |
| Existing Chattel Debt | 48,000 | 0% | guaranty | 20 yrs |
| Real Estate | 293,927.40 | 80% | guaranty | 20 yrs |
| Total Note | 639,877.73 | 58% | guaranty | |

2. The loan subsidy will be limited to 2.5%, fixed, and will be provided for the first three years. At the end of the third year, the need for the subsidy will be reviewed on an annual basis for the following two years.

3. Any secured income from this operation will be applied to guaranty before any other debt is paid, unless otherwise agreed to by the Bureau of Indian Affairs.

4. There will be a satisfactory field inspection completed before any guaranty funds are committed.

2/19/92 /s/ Gary R. Heitmann
Date [Acting] Assistant Area Director
Indian Programs

Accepted by Bank of Hoven, Hoven, South Dakota

Date Signature

Title

## [ATTACHMENT 4]

## GUARANTY

In consideration of financial accomodations [sic] given or to be given or continued to Long Family Land & Cattle Co., Inc., herein called "Borrower" by Bank of Hoven herein called "Bank", the undersigned irrevocably and unconditionally guarantee to the Bank, payment when due, whether by acceleration or otherwise, of any and all Liabilities of the Borrower as defined below to the Bank, together with all interest thereon; all attorneys' fees, costs, and expenses of collection incurred by the Bank in enforcing any of such Liabilities of the Borrower; and all attorneys' fees, costs, and expenses incurred by the Bank in foreclosing, preserving, protecting, retaking, holding, and selling of any collateral as a result of the enforcement or foreclosure of any security interest or mortgage given by Borrower to Bank.

The term "Liabilities of the Borrower" shall mean and include:

A. ☒ if checked, all indebtedness, liabilities or obligations, direct or contingent, secured or unsecured, joint, several, or joint and several, of the Borrower to Bank, created or incurred for any purpose whatsoever, now existing or hereafter arising, due or to become due to, or held or to be held, by the Bank for its own account or as agent for another or others, whether created or incurred directly or acquired by assignment or otherwise. (THERE IS NOT

A LIMIT TO THE AMOUNTS COVERED BY THIS GUARANTY).

B. ☐ if checked, the debts, liabilities, or obligations, direct or contingent, secured or unsecured, joint, several, or joint or several of the Borrower to Bank evidenced by the following: _____ _____ and any extensions, renewals, modifications or replacements thereof. (THIS GUARANTY IS LIMITED TO $_____).

The undersigned waive notice of the following: acceptance of this Guaranty and notice of the incurring of any of the Liabilities of the Borrower; presentment, demand for payment, protest, notice of protest, notice of dishonor or nonpayment of any instrument evidencing any of the Liabilities of the Borrower; notice of any alleged default, or notice of right to cure any default with respect to any of the Liabilities of the Borrower to the Bank; and notice of any lawsuit filed by or on behalf of the Bank against Borrower, or the taking of any other action by the Bank against, and any other notice to, any party liable for any of the Liabilities of Borrower (including the undersigned).

The Bank may at any time and from time to time (whether or not after revocation or termination of this Guaranty) without the consent of, or notice to, the undersigned; without incurring responsibility to the undersigned; and without impairing or releasing the obligations of the undersigned hereunder, do one or more of the following:

(1) renew, alter, or change in any manner the terms of any instrument evidencing any of the Liabilities of the Borrower, including any change in a) the rate of interest, and b) place, terms, or time of payment of any debt, liability, or obligation incurred directly or indirectly in respect thereof. This Guaranty shall apply to the Liabilities of the Borrower to the Bank as so changed, extended, renewed, or altered;

(2) sell, exchange, substitute, release, surrender, realize upon, or otherwise deal with in any manner and in any order any property by whomsoever at any time pledged, mortgaged, or otherwise securing any of the Liabilities of the Borrower to the Bank hereby guaranteed or any debts, liabilities or obligations (including any of those hereunder) incurred directly or indirectly in respect thereof or hereof, and/or exercise any right of setoff it may have.

(3) exercise or refrain from exercising any rights against the Borrower or others (including the undersigned) or otherwise act or refrain from acting:

(4) settle or compromise any of the Liabilities of the Borrower to the Bank hereby guaranteed or any security therefor [sic], or any debt, liability, or obligation (including any of those hereunder) incurred directly or indirectly in respect thereof or hereof, and may subordinate the payment of all or any part of the Liabilities of the Borrower to the payment of any debt, liability, or obligation (whether due or not) of

the Borrower to creditors of the Borrower other than the Bank and the undersigned; and

(5) apply any sums by whomsoever paid or howsoever realized to any Liabilities of the Borrower (regardless of the origin thereof) to the Bank, regardless of the nature of any of the Liabilities of the Borrower to the Bank which remain unpaid and regardless of the Borrowers' application or use of the consideration, if any, received in connection with any of the Liabilities of the Borrower to the Bank.

No invalidity, irregularity, or unenforceability of all or any part of the Liabilities of the Borrower to the Bank hereby guaranteed, or in any of the documents securing all or any part of the Liabilities of the Borrower, shall affect, impair, or be a defense to this Guaranty, and this Guaranty is a primary obligation of the undersigned.

The undersigned agree that the obligations and guaranty of the undersigned and the rights of the Bank in any collateral by whomsoever at any time pledged, conveyed, or mortgaged to secure, or howsoever securing any of the liabilities of the Borrower, shall not be released, discharged, or in any way affected, nor shall the undersigned have any rights against the Bank, by reason of the fact that (i) a valid or perfected lien, security interest, or encumbrance in any of the collateral may not be conveyed to, obtained by, or created in favor of Bank; (ii) any of the collateral may be subject to equities or defenses or claims in favor of others or may be invalid or defective in any

way; (iii) the value of any of the collateral, or the financial condition of the borrower, of any obligor, of any guarantor, or any of the collateral may not have been correctly estimated or may have changed or may hereafter change; or (iv) there is any deterioration, waste, or loss by fire, theft, or otherwise of any of the collateral.

The undersigned agree that the Bank shall not be required to resort first for payment to the Borrower, or other persons or corporations, their properties or estates, whether by lawsuit or otherwise, before enforcing this Guaranty. The undersigned further agree that Bank shall not be required to have any collateral or security applied to Liabilities of the Borrower (including other guaranties) before enforcing this Guaranty. The undersigned further agree that the Bank shall have a general lien on and security interest in and a right of setoff against all property of the undersigned including without limitation all deposits, cash, securities, notes, cash equivalents, or certificates of deposit now or hereafter in the Bank's possession or on deposit with the Bank, whether held in a general or special acount [sic], or for safekeeping or otherwise, and such lien, security interest, and right of setoff may be enforced or exercised without demand upon or notice to the undersigned.

If box A is checked above, this Guaranty is a continuing one and all of the Liabilities of the Borrower to the Bank to which it applies or may apply under the terms hereof shall be conclusively presumed

to have been created in reliance hereon. As to each of the undersigned, this Guaranty shall continue until written notice of revocation signed by such undersigned, or until written notice of the death of such undersigned shall in each case have been actually received by the Bank, notwithstanding revocation by, or the death of, or complete or partial release for any cause of, any one or more of the remainder of the undersigned, or of the Borrower, or of anyone liable or obligated in any manner for any of the Liabilities of the Borrower hereby guaranteed or for the debts, liabilities, or obligations (including those hereunder) incurred directly or indirectly in respect thereof or hereof. No revocation or termination hereof shall affect in any manner rights arising under this Guaranty with respect to (a) Liabilities of the Borrower to the Bank which shall have been created, contracted, assumed, or incurred prior to receipt by the Bank of written notice of such revocation or termination or (b) Liabilities of the Borrower to the Bank which shall have been created, contracted, assumed, or incurred after receipt of such written notice pursuant to any contract entered into by the Bank prior to receipt of such notice; and the sole effect of revocation or termination hereof shall be to exclude from this Guaranty Liabilities of the Borrower to the Bank thereafter arising which are unconnected with Liabilities of the Borrower to the Bank arising or transactions entered into before the date of revocation or termination.

If claim is ever made upon the Bank for repayment or recovery of any amount or amounts received

by the Bank in payment or on account of any of the Liabilities of the Borrower to the Bank and the Bank repays all or part of said amount by reason of (a) any judgment, decree, or order of any court or administrative body having jurisdiction over the Bank or any of the property, or (b) any settlement or compromise of any such claim effected by the Bank with any such claimant (including the Borrower), then and in such event the undersigned agree that any such judgment, decree, order, settlement, or compromise shall be binding upon the undersigned, notwithstanding any revocation hereof or the cancellation of any note or other instrument evidencing any of the Liabilities of the Borrower to the Bank, and the undersigned shall be and remain liable to the Bank hereunder for the amount so repaid or recovered to the same extent as if such amount had never originally been received by the Bank.

Any acknowledgment or new promise, whether by payment of principal or interest or otherwise and whether by the Borrower or others (including the undersigned), with respect to any of the Liabilities of the Borrower to the Bank shall, if the statute of limitations in favor of the undersigned against the Bank shall have commenced to run, toll the running of such statute of limitations and, if the period of such statute of limitations shall have expired, prevent the operation of such statute of limitations.

No delay on the part of the Bank in exercising any of its options, powers, or rights, or partial or single exercise thereof, shall constitute a waiver

thereof. No waiver of any of its rights hereunder, and no modification or amendment of this Guaranty, shall be deemed to be made by the Bank unless the same shall be in writing, duly signed on behalf of the Bank, and each such waiver, if any, shall apply only with respect to the specific instance involved, and shall in no way impair the rights of the Bank or the obligations of the undersigned to the Bank in any other respect at any other time.

The undersigned waive all rights of subrogation to Bank's rights against the Borrower until all of the Liabilities of the Borrower to the Bank guaranteed hereunder shall have been fully paid and discharged.

This Guaranty and the rights and obligations of the Bank and of the undersigned hereunder shall be govered [sic] and construed in accordance with the laws of the State of South Dakota; and this Guaranty is binding upon the undersigned, his, her, their, or its executors, administrators, successors, or assigns and shall inure to the benefit of the Bank, its successors, or assigns.

The undersigned, if more than one, shall be jointly and severally liable hereunder and the term "undersigned" wherever used herein shall mean the undersigned or any one or more of them. Anyone signing this Guaranty shall be bound hereby, whether or not anyone else signs this Guaranty at any time. The term "Bank" includes any agent of the Bank acting for it.

If any of the provisions of this Guaranty shall contravene or be held invalid under the laws of the applicable jurisdiction, this Guaranty shall be construed as if not containing those provisions and the rights and obligations of the parties shall be construed and enforced accordingly.

In addition to the other provisions contained herein, this Guaranty is secured by all assets.

Dated: 3/5, 1992.

/s/ Kenneth Long _____

(Address)

_____ _____

(Address)

**INDIVIDUAL ACKNOWLEDGEMENT**

State of South Dakota )
) ss.
County of Potter )

On this 5th day of March, 1992, before me, a Notary Public, personally appeared Kenneth Long, to me known to be the identical person(s) who executed the foregoing instrument, and it is executed as a voluntary act and deed.

/s/ Charles E. Simon
Notary Public

My Commission expires: CHARLES E. SIMON
Notary Public, POTTER
COUNTY, S. DAK.
My Commission Expires
MARCH 2, 1995

## CORPORATE ACKNOWLEDGEMENT

State of _____ )
) ss.
County of _____ )

On this _____ day of _____, 19___, before me, a Notary Public, personally appeared _____, to me personally known, who being by me duly sworn did say that he/she is the _____ of _____, a Corporation; that the seal affixed to the instrument is the seal of said Corporation (or that no seal has been provided by said Corporation); that said instrument was signed (and sealed) on behalf of said Corporation by authority of its Board of Directors; and the said _____ acknowledged the execution of said instrument to be the voluntary act and deed of said Corporation.

_____
Notary Public

My Commission expires: _____

## [ATTACHMENT 1]

Attachment to Form 5-4755
Request for loan Guaranty –
Long Family Land & Cattle Co.
Modification #1

(f). Other Conditions

1. The loans will be structured as follows:

| | | | | | |
|---|---|---|---|---|---|
| Operating Line of Credit | $50,000 | 84% | guaranty | 3 yrs | |
| Total Note #1 | 50,000 | | | | |
| Cattle Purchases | 85,000 | 84% | guaranty | 20 yrs | |
| Existing Guaranty | 293,930 | 84% | guaranty | 20 yrs | |
| Total Note #2 | 428,930 | | | | |
| Real Estate | 211,750 | –0– | guaranty | 20 yrs | |
| Total Note #3 | 211,750 | | | | |

2. The loan subsidy will be limited to 2.5%, fixed, and will be provided for the first three years. At the end of the third year, the need for the subsidy will be reviewed on an annual basis for the following two years.

3. Security for this guaranty will consist of a first lien on all receivables, livestock, feed, grain, crops, machinery, equipment now owned or hereafter acquired and a second lien on all real estate and vehicles.

4. No additional real estate loans will be advanced and the note will not contain a balloon clause.

5. A UCC/EFS will be executed in favor of the Bank of Hoven to perfect the security interest in the BIA guaranteed notes.

6. Proceeds from the sale of livestock or other products will first be applied to the BIA line of credit and term loan payment, followed by the scheduled payment on the unguaranteed notes. Any excess proceeds will be made available to offset operating funds for subsequent year. Such funds will directly reduce borrowers line of credit borrowing limit.

FEB 26 1992 /s/ (SGD) DONALD E. WHITENER
Date Assistant Area Director
Indian Programs

Accepted by Bank of Hoven, Hoven, South Dakota

| 3-10-92 | /s/ Tim Gapp |
| --- | --- |
| Date | Signature |
| | Asst. Cashier |
| | Title |

**[ATTACHMENT 1]**

BH *BANK OF HOVEN*

April 9th, 1992

Bureau of Indian Affairs
Credit Office
Aberdeen, SD 57401

RE: Long Family guaranty loan request:

Dear Sirs,

The Bank of Hoven has approved the following loan request by Long Family Land & Cattle Co., Inc. contingent upon receiving an 80% BIA guaranty.

$60,000.00 loan to purchase 100 head of yrl., heifers.
7 years, 2¾% + NY Prime interest rate.

Security to be used will be purchase money in 100 heifers, general farm security in all chattels and 1st mortgage on home in Timber Lake, SD.

This request will increase the breeding stock for the 1993 calf year. The first year approx. 10% of heifers will be sold as open heifers. Proceeds from the heifers sold will be used to pay interest. The first payment will call for interest only. The remaining 6 payments will be amortized for 6 equal payments of principal and interest.

Please review the enclosed application package. Feel free to call me if you have any questions regarding this matter. Thank you.

Sincerely,

/s/ Tim Gapp

Tim Gapp,
Asst. Cashier

**[ATTACHMENT 1]**

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
ABERDEEN AREA OFFICE
115 FOURTH AVENUE S.E.
ABERDEEN, SOUTH DAKOTA 57401

[SEAL] [LOGO]

IN REPLY REFER TO:
Credit

MAY 15 1992

Mr. Tim Gapp
Bank of Hoven
Box 7
Hoven, South Dakota 57450

Dear Mr. Gapp:

Thank you for the prompt submittal of the initial premium payment for the 84% loan guaranty modification for Long Family Land & Cattle Co., Inc.. Enclosed is the original of Loan Guaranty Certificate No. G922D1A0103.

Sincerely,

[Illegible]
[Acting] Assistant Area Director
Indian Programs

Enclosure

**UNITED STATES DEPARTMENT**
**OF THE INTERIOR**
**BUREAU OF INDIAN AFFAIRS**

**LOAN GUARANTY CERTIFICATE**

Form 5-4756
(April 1975)

Certificate No. G922D1A0103

Long Family Land & Cattle Co., Inc.
Borrower (Last Name First)

Box 272
Property Address

Timber Lake, South Dakota 57656
City State & Zip Code

Lender – Name & Address

Bank of Hoven
P.O. Box 7
Hoven, South Dakota 57450

Date May 15, 1992

| | | |
|---|---|---|
| Loan Amount | $428,930 | |
| Percent of Loan Guaranteed | 84 | % |
| Interest Subsidy Rate | 2.5 | % |
| Premium Rate | ½ of 1 | % |

This certificate is evidence of the loan described herein being guaranteed under the Indian Financing Act of 1974 (25 U.S.C. § 1451 et seq.) and the regulations of the Department of the Interior (25 CFR § 93 et seq.). If assigned, endorse on reverse and notify Commissioner as required in the Guarantee Agreement.

BUREAU OF INDIAN AFFAIRS

/s/ William C. [Illegible]
~~Commissioner of Indian Affairs~~
[Acting] Area Director

**[ATTACHMENT 1]**

[1/credit /s/ RMC 6/4/___]

JUN 21 1992

Credit

Mr. Tim Gapp
Bank of Hoven
Box 7
Hoven, South Dakota 57450

Dear Mr. Gapp:

We have completed a review of your Bank's BIA Guaranty request for the Long Family Land and Cattle Company in the amount of $60,000. We are pleased to inform you the Modification has been approved for an 80% Guaranty contingent upon the conditions outlined in the enclosed Attachment Form 5-4755.

Please review and sign the Attachment and return the original and two copies to the Superintendent, Cheyenne River Agency. Once the conditions have been met and the loan closed, please furnish the Agency Superintendent with three copies of all loan documents. The Guaranty will be effective upon our receipt of the premium payment and NEPA documentation.

If you have any questions, please feel free to contact Stacey Johnston at (605) 226-7381.

Sincerely,

(SGD) Gary Heitmann
[Acting] Assistant Area
Director
Indian Programs

Enclosures

cc:
Supt., Cheyenne River Agency, Credit
Washington Office, Financial Assistance, Code 270
Mary McClammy, Loan Acctg. Sec., Albuquerque, NM
Long Family Land/Cattle Co., Timber Lake, SD 57656

## [ATTACHMENT 1]

Attachment to Form 5-4755
Request for loan Guaranty –
Long Family Land & Cattle Co.

(f). Other Conditions

This loan will be structured as follows:

1. $60,000 80% guaranty to purchase 100 head of yearling heifers and an interest rate of 2.75% above the New York Prime, fixed.

2. The loan subsidy will be limited to 1.75%, fixed, and will be provided for the first three years. At the end of the third year, the need for the subsidy will be reviewed on an annual basis for the following two years.

3. Security for this guaranty will consist of no less than first lien on all receivables, livestock, feed, grain, crops, machinery, equipment now owned or hereafter acquired and a real estate mortgage on house in Timber Lake.

4. This loan will be amortized for six years after an interest only payment the first year.

5. **This commitment is contingent upon applicant's full and complete compliance with requirements of National Environmental Protection Act (NEPA). No funds shall be disbursed prior to BIA receipt of written documentation confirming compliance with NEPA requirements.**

Accepted by Bank of Hoven, Hoven, South Dakota

| June 19, 1992 | /s/ Tim Gapp, Asst. Cashier |
| --- | --- |
| Date | Signature |
| | Title |

[ATTACHMENT 1]

**UNITED STATES DEPARTMENT OF THE INTERIOR**
**BUREAU OF INDIAN AFFAIRS**

**LOAN GUARANTY CERTIFICATE**

Form 5-4756
(April 1975)

Certificate No. G924C1A0113

Long Family Land & Cattle Company
Borrower (Last Name First)

Box 186
Property Address

Timber Lake, South Dakota 57656
City State & Zip Code

Lender – Name & Address

Bank of Hoven
P.O. Box 7
Hoven, South Dakota 57450

Date FEB 22 1993

| | | |
|---|---|---|
| Loan Amount | $60,000 | |
| Percent of Loan Guaranteed | 80 | % |
| Interest Subsidy Rate | 1.75 | % |
| Premium Rate | ½ of 1 | % |

This certificate is evidence of the loan described herein being guaranteed under the Indian Financing Act of 1974 (25 U.S.C. § 1451 et seq.) and the regulations of the Department of the Interior (25 CFR § 93

et seq.). If assigned, endorse on reverse and notify Commissioner as required in the Guarantee Agreement.

BUREAU OF INDIAN AFFAIRS

/s/ (SGD) GARY HEITMANN
~~Commissioner of Indian Affairs~~
[Acting] Assistant Area Director,
Indian Programs

---

Attachment to Form 5-4755
Request for loan Guaranty –
Long Family Land & Cattle Co.

(f). Other Conditions

This loan will be structured as follows:

1. $60,000 80% guaranty to purchase 100 head of yearling heifers and an interest rate of 2.75% above the New York Prime, fixed.

2. The loan subsidy will be limited to 1.75%, fixed, and will be provided for the first three years. At the end of the third year, the need for the subsidy will be reviewed on an annual basis for the following two years.

3. Security for this guaranty will consist of no less than first lien on all receivables, livestock, feed, grain, crops, machinery, equipment now owned or hereafter acquired and a real estate mortgage on a house in Timber Lake.

4. This loan will be amortized for six years after an interest only payment the first year.

5. This commitment is contingent upon applicant's full and complete compliance with requirements of National Environmental Protection Act (NEPA). No funds shall be disbursed prior to BIA receipt of written documentation confirming compliance with NEPA requirements.

Accepted by Bank of Hoven, Hoven, South Dakota

_____ _____

Date Signature

_____

Title

[ATTACHMENT 1]

**BILL FOR COLLECTION**

DI-1040
Revised
(Aug. 1973)

Bill No. A0096718

Make remittance Payable to: Bureau of Indian Affairs
(Bureau or Office)

Date 3/19/93

Mail Payment To: 115 4th Ave. S.E., Aberdeen, SD 57401
(Address)

CV-A00-93-00157

PAYER:

Bank of Hoven
P.O. Box 7
Hoven, SD 57450

Amount of Payment $ 1,024.18

| Date | DESCRIPTION | Quantity | Unit Price | | Amount |
|---|---|---|---|---|---|
| | | | Cost | Per | |
| | Premium payment for Long Family Land/Cattle Co., on Loan Guaranty No. G922D1A0103, on $409,672.99, for the period 12/31/92 thru 6/30/93 | | | | 1024.18 |
| | **Bank of Hoven Expense Check #7292 dated 3/1/93** | | AMOUNT DUE THIS BILL, | | $1,024.18 |

Amount received, $_____

03-30-93 [/s/ JT] Joann Traversie Auth. Coll.

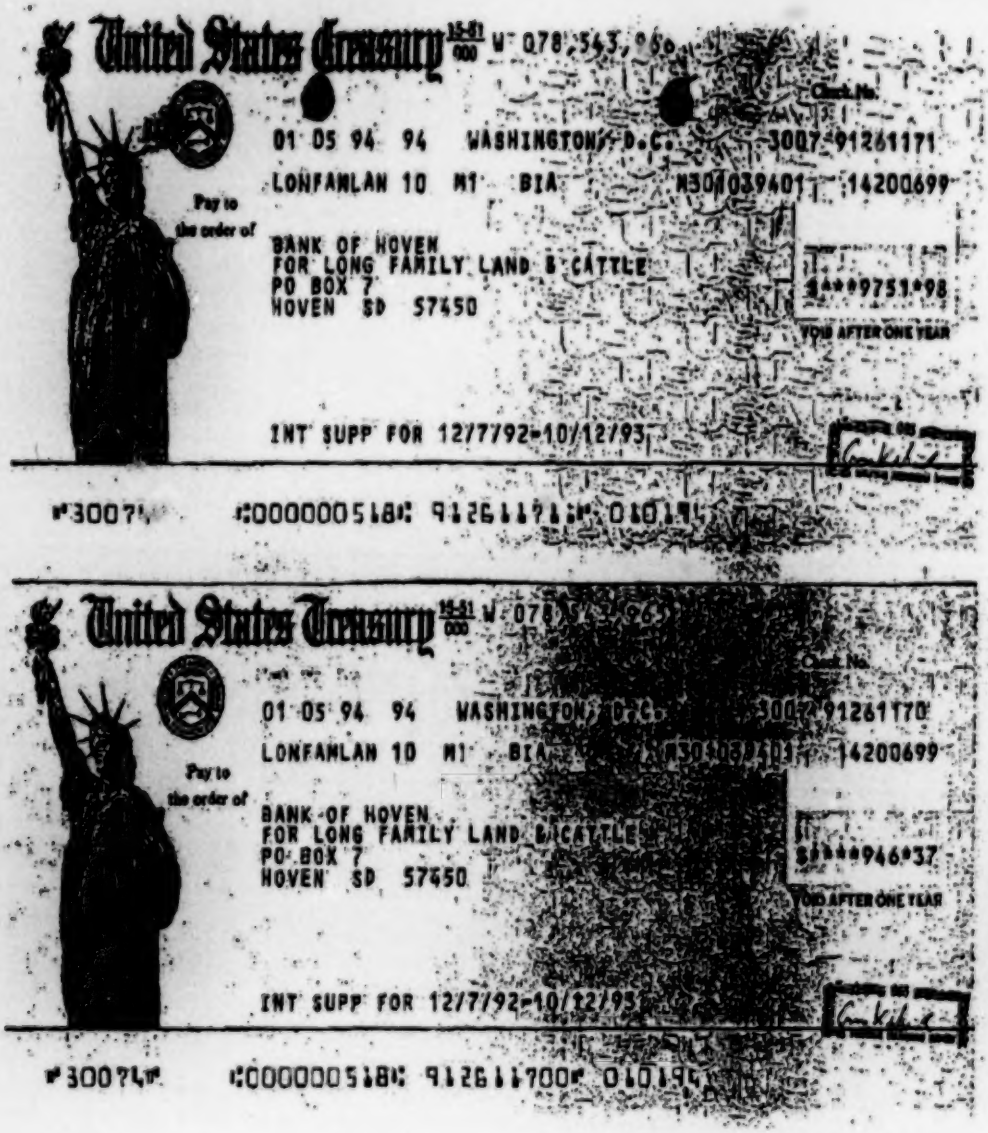
ACCOUNTING CLASSIFICATION (Appropriation Symbol must be shown; other classification optional)

001-A01100-92-14X4415-42900-5205 $1,024.18

SENT TO ALBUQUERQUE 3-31-93 JT P 391 566 588

ADMINISTRATIVE OR BILLING COPY

BEST AVAILABLE COPY


United States Treasury

01 05 94 94 WASHINGTON, D.C. 3007 91261171

LONFAMLAN 10 M1 BIA M30039401 14200699

Pay to the order of

BANK OF HOVEN
FOR LONG FAMILY LAND & CATTLE
PO BOX 7
HOVEN SD 57450

$****9751.98

VOID AFTER ONE YEAR

INT SUPP FOR 12/7/92-10/12/93

:0000005180: 91261171: 010194

United States Treasury

01 05 94 94 WASHINGTON, D.C. 3007 91261170

LONFAMLAN 10 M1 BIA M30039403 14200699

Pay to the order of

BANK OF HOVEN
FOR LONG FAMILY LAND & CATTLE
PO BOX 7
HOVEN SD 57450

$****946.37

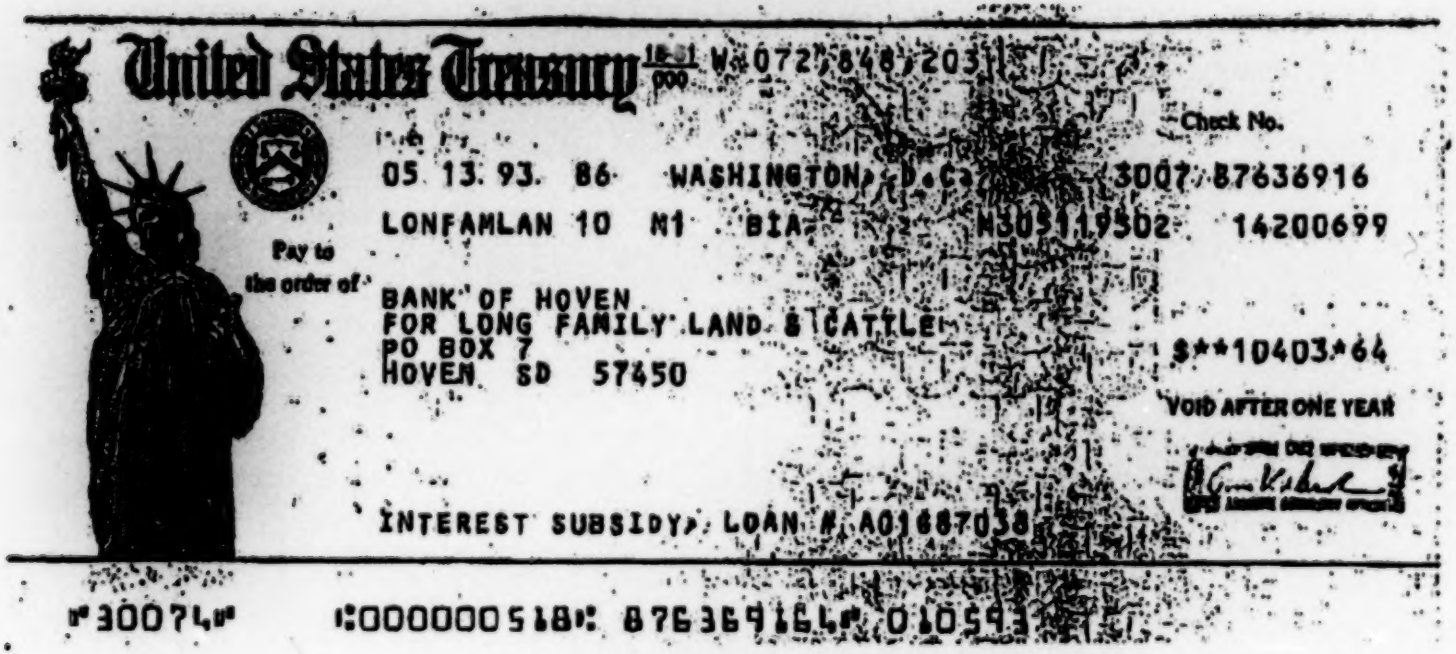
VOID AFTER ONE YEAR

INT SUPP FOR 12/7/92-10/12/93

:0000005180: 91261170: 010194

[ATTACHMENT 1]

[ATTACHMENT 1]


United States Treasury 18-1/000 W 072 848 203

Check No.

05 13 93 86 WASHINGTON D C 3007 87636916

LONFAMLAN 10 M1 BIA M30511950Z 14200699

Pay to the order of

BANK OF HOVEN
FOR LONG FAMILY LAND & CATTLE
PO BOX 7
HOVEN SD 57450

$**10403.64

VOID AFTER ONE YEAR

INTEREST SUBSIDY LOAN # A01687038

"3007" :000000518: 87636916" 010593

[Received 5-17-93]

United States Treasury 15-61/000 P 226,38[illegible]398

Check No.

12 09 94 64 PHILADELPHIA, PA → 2036 60221311

LONFAMLAN 10 M1 BIA M312069401 14200699

Pay to the order of

BANK OF HOVEN
FOR LONG FAMILY LAND & CATTLE
PO BOX 7
HOVEN SD 57450

$**10693*36

VOID AFTER ONE YEAR

LOAN GUARANTY FOR 10/12/93-11/9/94

⑈2036⑈ ⑆000000518⑆ 60221311⑈ 011294

United States Treasury 15-61/000 P 226,383,399

Check No.

12 09 94 62 PHILADELPHIA, PA → 2036 60221312

LONFAMLAN 10 M1 BIA M312069401 14200699

Pay to the order of

BANK OF HOVEN
FOR LONG FAMILY LAND & CATTLE
PO BOX 7
HOVEN SD 57450

$****970*44

VOID AFTER ONE YEAR

LOAN GUARANTY FOR 10/12/93-11/9/94

⑈2036⑈ ⑆000000518⑆ 60221312⑈ 011294

[ATTACHMENT 1]

88

BEST AVAILABLE COPY

**[ATTACHMENT 21]**

## Last Will and Testament

I, Kenneth L. Long, of Timber Lake, Dewey County, South Dakota, being of sound mind and disposing memory, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all other Wills and Codicils by me heretofore made.

I.

I hereby direct that all expenses of my last illness and funeral be paid out of my estate.

II.

I hereby devise unto Paulette Rowley my house and lots and all improvements thereon together with all personal property contents in said improvements and my car.

III.

I hereby devise unto my children, Myrna Fiddler, Ronnie Long, Robert Long and Terry Long all the rest and residue of my estate equally in undivided interests.

IV.

I hereby nominate and appoint Paulette Rowley executrix (personal representative) of my estate and I further request that she not be compelled to furnish bond or security.

IN WITNESS WHEREOF, I hereunto set my hand this 29th day of June, 1995.

/s/ Kenneth L. Long
Kenneth L. Long

THIS INSTRUMENT was, on the date last above written, signed, published and declared by the said Kenneth L. Long to be his Last Will and Testament in our presence, who at his request have subscribed our names thereto as witnesses in his presence and in the presence of each other.

/s/ Linda Dahlgren residing at Timber Lake, SD 57656

/s/ Deb Holzer residing at Timber Lake, SD 57656

STATE OF SOUTH DAKOTA )
: SS
COUNTY OF DEWEY )

We, Kenneth L. Long, Linda Dahlgren and Deb Holzer, the testator and the witnesses respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his Last Will and Testament and that he had signed willingly or directed another to sign for him, and that he executed it

as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witnesses and that to the best of their knowledge the testator was at the time 18 or more years of age, of sound mind and under no constraint or undue influence.

/s/ Kenneth L. Long
Kenneth L. Long

/s/ Linda Dahlgren

/s/ Deb Holzer
Witnesses

Subscribed, sworn to and acknowledged before me by Kenneth L. Long, the testator, and subscribed and sworn to before me by Linda Dahlgren and Deb Holzer, witnesses, this 29th day of June, 1995.

/s/ Andrew Aberle
Andrew Aberle, Notary Public,
South Dakota

My Commission Expires: 10/15/98
(SEAL)

[Filed Dewey County
Timber Lake, South Dakota
JUL 28 1995
11:15 o'clock A.M.
[Illegible], Clerk]

PURCHASER'S RECEIPT - RETAIN FOR YOUR RECORDS

53378

PURCHASED BY 76-687/914

Long Family Land & Cattle Co. 11/28 95

PAYABLE TO Bureau of Indian Affairs 7,774576

NOT NEGOTIABLE

7,774 AM. 76 CTS

RECEIPT FOR BANK MONEY ORDER DRAWN ON

BANK OF HOVEN
HOVEN, SOUTH DAKOTA 57450

MEMORANDUM

FOR

Lease Payment

⑈053378⑈ ⑆091408679⑆ 100241090⑈

PURCHASER'S RECEIPT - RETAIN FOR YOUR RECORDS

53379

PURCHASED BY 76-687/914

Long Family Land & Cattle Co. 11/28 95

PAYABLE TO Cheyenne River Sioux Tribe 9,602.73

NOT NEGOTIABLE

9602 AM. 73 CTS

RECEIPT FOR BANK MONEY ORDER DRAWN ON

BANK OF HOVEN
HOVEN, SOUTH DAKOTA 57450

MEMORANDUM

FOR

Lease payment

⑈053379⑈ ⑆091408679⑆ 100241090⑈

96

[ATTACHMENT 1]

[ATTACHMENT 2]

BH *BANK OF HOVEN*

April 26th, 1996

Ronnie Long
Box 272
Timber Lake, S.D. 57656

Dear Ronnie:

This is an update to my letter written on April 17, 1996. I had previously talked to you about the bank foreclosing on the land base and the house in Timber Lake. The house would be sold with the sale proceeds applied to your BIA guaranteed debt, and the land base would be deeded to the bank and sold back to you on a contract.

There appears to be some difficulties in dealing with this situation in that manner. After talking to our legal counsel, David Von Wald, the only way the bank could sell this property back to you would be for you to secure financing through another financial institution or go through a government agency guaranteed loan such as FHA, BIA or SBA through our bank. This is because of possible jurisdictional problems if the bank ever had to foreclose on this land when it is contracted or leased to an Indian owned entity on the reservation.

Please call me at the bank if you have any questions on the above matter. We will try to proceed as soon as possible to secure financing through one of the above federal agencies or you can try to secure financing

through another financial institution, as these appear to be the only ways we could sell the land base back to you. Thank you!

Sincerely,

/s/ Charles Simon
Charles Simon, VP
Bank of Hoven
P.O. Box 7
Hoven, S.D. 57450

---

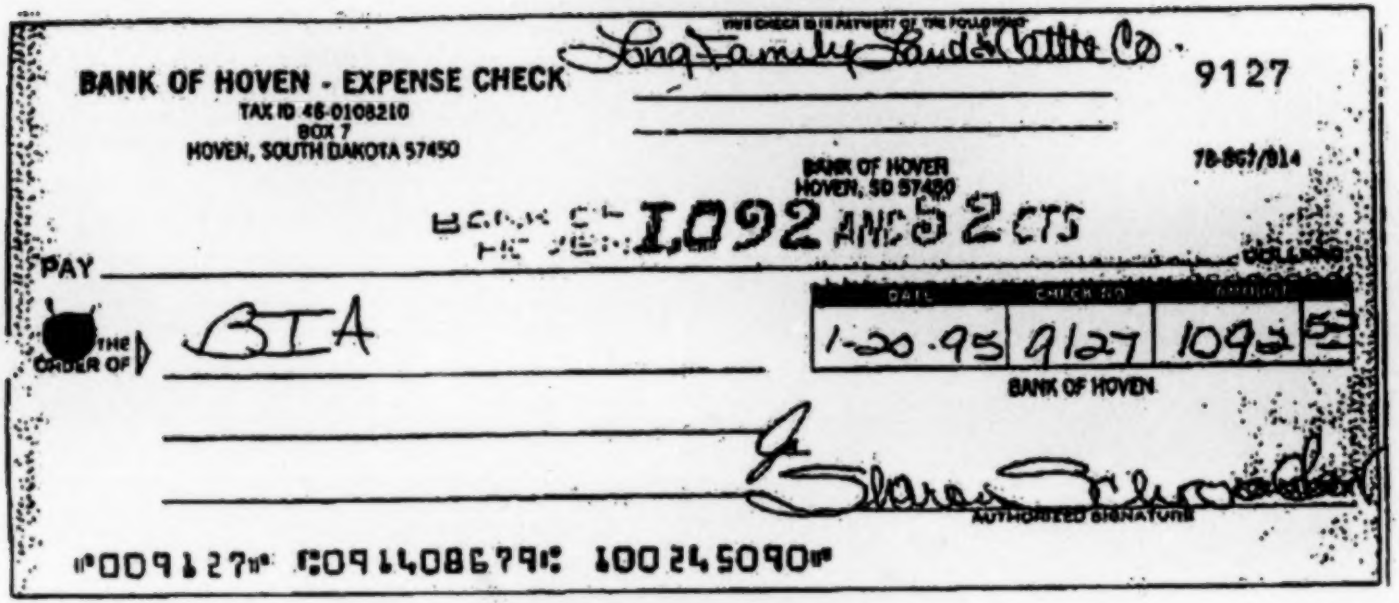
[ATTACHMENT 3]

November 1, 1996

Proposed Loan Agreement between Long Family Land and Cattle Co., Inc. (LFL&CC) and the Bank of Hoven:

The Bank of Hoven has received deed to approximately 2230 acres of real estate in Dewey County and a house in Timber Lake, S.D. through the estate of Kenneth Long. The bank will lease the farm and ranch real estate to LFL&CC for three years with an option to purchase. The selling price on this land is $468,000.00 plus any misc. selling expenses. The bank will pay off the State Enhancement debt for approximately $90,000.00, past due taxes for approximately $23,000.00, attorney fees for approximately $9000.00 and title insurance cost for $473.00. These amounts will be deducted from the $468,000.00 for a net remaining amount of approximately $345,527.00. The house, in Timber Lake will be given a credit for $10,000.00. The approximate amount of $355,527.00 will be taken off of LFL&CC bank debt. It will pay off land note# 98179 for $198,699.83, LIFO note# 2002 for $48,000.00, OL note# 2470 for $5000.00, backhoe note# 1866 for $3500.00, BIA guaranteed note# 98262 for $44,696.24, BIA guaranteed note# 98809 for $43,132.05 with the balance of proceeds of $12,498.88 to be applied to interest on BIA guaranteed note# 98181. If the house in Timber Lake sells for less than $10,000.00, after the bank receives the sale amount plus reimbursement for any

[ATTACHMENT 1]


BANK OF HOVEN - EXPENSE CHECK
TAX ID 46-0108210
BOX 7
HOVEN, SOUTH DAKOTA 57450

Long Family Land & Cattle Co.

9127

BANK OF HOVEN
HOVEN, SD 57450

78-867/814

PAY ONE THOUSAND NINETY TWO AND 52 CTS

THE ORDER OF BIA

| DATE | CHECK NO. | AMOUNT | |
|---|---|---|---|
| 1-20-95 | 9127 | 1092 | 52 |

BANK OF HOVEN

AUTHORIZED SIGNATURE

⑈009127⑈ ⑆091408679⑆ 100245090⑈

[RECEIVED JAN 30 1995
Bureau of Indian Affairs Loan Accounting Section]

[ATTACHMENT 1]

********* RECEIPT FOR COLLECTION *********
**UNITED STATES DEPARTMENT OF INTERIOR**
**BUREAU OF INDIAN AFFAIRS**

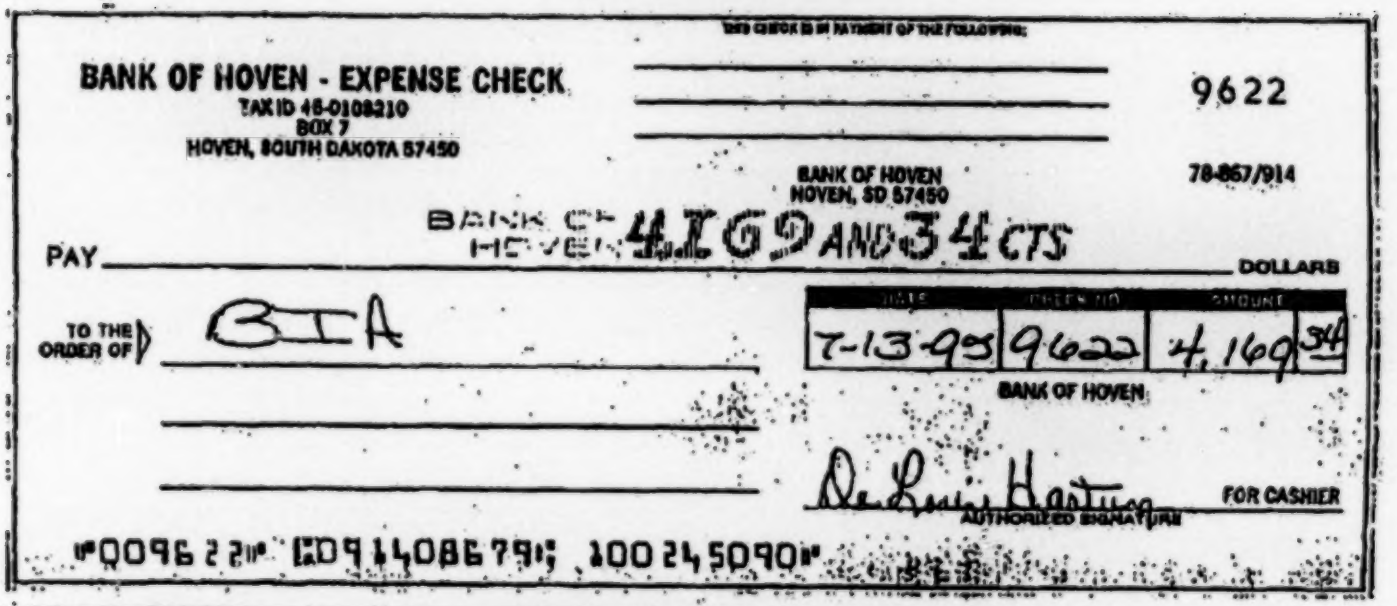
COLLECTION DATE: 30-Jan-95

REMITTED BY: BANK OF HOVEN
FOR: LONG FAMILY LAND & CATTLE CO., INC.
POST OFFICE BOX 7
HOVEN, SD 57450

Vendor Code: LONFAMLAN 1

| ACCOUNTING STRIP | | DESCRIPTION | AMOUNT |
|---|---|---|---|
| | | LOAN GUARANTY-G922D1A0103/G923C1A0113<br>FOR: LONG FAMILY LAND & CATTLE CO., INC. | |
| A00100 | 92 42900 5205<br>RPTC: 922D/923C | GUARANTY PREMIUM, POST ORIGINATION FEES – CHECK #9127 DATED 1/20/95<br>FOR THE PERIOD 1/1/95 TO 6/30/95 | $1,092.52 |
| | | Total: | $1,092.52 |

[ATTACHMENT 1]



BANK OF HOVEN - EXPENSE CHECK
TAX ID 46-0108210
BOX 7
HOVEN, SOUTH DAKOTA 57450

9622

BANK OF HOVEN
HOVEN, SD 57450

78-867/914

PAY 4,169 AND 34 CTS DOLLARS

TO THE ORDER OF BIA

| DATE | CHECK NO | AMOUNT | |
|---|---|---|---|
| 7-13-95 | 9622 | 4,169 | 34 |

BANK OF HOVEN

FOR CASHIER

AUTHORIZED SIGNATURE

⑈009622⑈ ⑆091408679⑆ 100245090⑈

[RECEIVED JUL 17 1995
Bureau of Indian Affairs Branch of Operations Loan Accounting Section]

misc. selling costs, the shortage will be added to the selling price on the land for $468,000.00. If the house sells for more than $10,000.00, and the bank receives $10,000.00 plus reimbursement for any misc. selling costs, the extra amount will be taken off of the selling price of $468,000.00. This amount will accrue interest at 8.50%. The bank will receive the CRP payments of approximately $44,000.00 for 1997, 1998 and 1999. Interest will be paid 1st each year upon receipt of the CRP payment with the balance to go toward principal reduction. Annual real estate taxes and liability and building insurance will be the responsibility of LFL&CC. The terms and conditions of the lease with option to purchase will be reviewed at the maturity date of November 1, 1999.

Another loan will be made to LFL&CC for $100,000.00 to give them a credit for 250 calves at $250/hd or $62,500.00 with the balance of $37,500 to be used to purchase another 110 calves to be fed and pastured with their own calves. The $62,500.00 will be used to help pay interest current on all bank debt for approximately $91,000.00 of which approximately $12,500.00 would already be paid from the land credit proceeds as stated above. The balance of the interest would be paid from sale of wheat, millet and 10 assorted yearlings. The bank would have 1st security on all calves and yearlings with the note to be paid 1st in the fall when yearlings are sold.

Another loan will be made to LFL&CC for $70,000.00 under a 90% BIA guarantee to pay annual operating and living expenses. This note will have 2nd security

to the calves and yearlings and 1st security to the crops. It will be paid down to $1.00 annually.

BIA guaranteed note# 98181 can be rescheduled into a 20 year loan with the guarantee to increase to 90%. Security on this loan would be all cows, bulls and machinery. Annual payment would be made each fall when yearlings and crops are sold.

[This is the agreement that was wrote on the blackboard when deal was made. The Bank paid these bills but they were charged to my debt. The only thing that happened was the land was [illegible]]

---

## [EXHIBIT 4]

## LEASE WITH OPTION TO PURCHASE

* * *

This Indenture, made and entered into and executed in duplicate this 5th day of December, 1996, by and between Bank of Hoven, a South Dakota Banking Corporation, P.O. Box 7, Hoven, South Dakota 57450, P.O., lessor, and Long Family Land and Cattle Company, Inc., of P.O. Box 272, Timber Lake, South Dakota 57656, lessee, WITNESSETH:

That the Lessor in consideration of the rents and covenants hereinafter mentioned, does hereby demise, lease and let unto the said lessee, and the said lessee does hereby hire and take from the said lessor, the following described real estate situated in Dewey County, South Dakota:

The East Half (E½) of Section One (1), Township Fifteen (15) North, Range Twenty Four (24), East of the Black Hills Meridian;

The Northwest Quarter (NW¼) of Section Twenty Five (25), all of Section Twenty Eight (28), the East Half (E½) of Section Thirty Two (32), the Northeast Quarter (NE¼), the West Half of the Northeast Quarter of the Northwest Quarter (W½NE¼NW¼), the Southeast Quarter of the Northeast Quarter of the Northwest Quarter (SE¼NE¼NW¼), the West Half of the Northwest Quarter (W½NW¼) and the Southeast Quarter of the Northwest Quarter (SE¼NW¼) and the South Half (S½) of Section Thirty Three (33);

and the Southwest Quarter (SW¼) of Section Thirty Four (34), all in Township Seventeen (17) North, Range Twenty Five (25), East of the Black Hills Meridian, subject to easements, reservations and conveyances, if any, existing and of record,

to have and to hold, the above leased premises unto the said lessee for the full term of two (2) years from and after December 5, 1996.

LEASE PAYMENTS:

The said lessee agrees to and with the said lessor to pay as rent for the above described real estate, the sum of Forty Four Thousand One Hundred Ninety Eight Dollars ($44,198.00), per year, payable in approximately October or November of 1997 and 1998. Said payment is a CRP payment which will be payable from the United States Government to lessee, and lessee agrees to assign said payment to lessor so that lessor may receive said payment directly from the United States Government.

NO ASSIGNMENT OR SUBLETTING:

It is understood that the lessee shall not have the right to sublet the above described real estate, or any part thereof, nor assign this lease without the prior written consent of the lessor.

REAL ESTATE TAXES:

The lessee shall pay the 1996 real estate taxes which become due and a lien on January 1, 1997, and the 1997 real estate taxes which become due and a

lien on January 1, 1998, before the same shall become delinquent.

POSSESSION:

The lessee is currently in possession of the above described real estate and its possession shall terminate on December 5, 1998.

OPTION TO PURCHASE:

The lessee shall have an option to purchase the above described real estate during the term of this lease under the following terms and conditions:

A. The option purchase price for the above described real estate shall be the sum of Four Hundred Sixty Eight Thousand Dollars ($468,000.00).

B. In the event lessee wishes to exercise its option to purchase, it must give notice to lessor in writing and pay five percent (5%) of the purchase price and furnish the remaining balance of purchase price within sixty (60) days of the date of any such notice.

C. Lessee shall pay all selling expenses, including attorney fees, transfer fees, title insurance and any other miscellaneous expenses, including real estate taxes.

D. Lessor agrees to provide a Quit Claim Deed only, quitclaiming its interest in the above described real estate to the lessee, upon receipt of the entire purchase price.

E. Lessor agrees that there is currently a mortgage under the State Enhancement Program which it shall forthwith pay off, and additionally it shall satisfy any mortgages wherein the Bank of Hoven is presently the mortgagee.

F. Lessor now owns residential real estate in Timber Lake, formerly owned by Kenneth Long, and has credited lessee's notes for $10,000.00. In the event[s] said residential property is sold for more than $10,000.00, lessee[or /s/ RL] agrees to reduce the selling price of the above described farm real estate any net amount, after expenses exceeding $10,000.00. In the event said residential real estate is sold for less than $10,000.00, the selling price of the above described farm real estate shall be increased by the net amount, after expenses of less than $10,000.00. Lessor does not warrant that it will sell said residential real estate nor is it under any obligation to attempt to sell the same. In the event it is not sold at the time lessee exercises its option to purchase, the option price of the farm real estate shall not be affected. If lessor later sells said residential real estate, or if lessee does not exercise its option to purchase, any proceeds from the sale of said residential property will be the Bank of Hoven's.

G. In the event lessee exercises its option to purchase, all rent payments received prior to the purchase of said real estate will be credited against the purchase price of said real estate, minus an amount equal to interest at the rate of eight and one-half

percent (8.5%) per annum on the unpaid balance of purchase price from and after December 5, 1996.

INSURANCE:

Lessor will purchase a policy of insurance insuring the buildings located on the above described real estate against loss by fire and extended coverage along with liability insurance, and it shall be the responsibility of the lessee to reimburse the lessor for the cost of all such insurance.

WASTE:

Lessee agrees that it shall not commit any waste on the above described real estate and shall farm or graze said real estate in a good and husbandlike manner and shall maintain the buildings and fences in a good state of repair, reasonable wear and tear by the elements alone excepted, at its expense.

DEFAULT:

That should the lessee fail to pay any of the rent aforesaid when due, or fail to fulfill any of the covenants herein contained, and in that event, it shall be lawful for the said lessor to re-enter and take possession of the above rented premises and to hold and enjoy the same without such re-entering working a forfeiture of the rents to be paid, and the covenants to be performed by the said lessee for the full term of this lease and to pursue any other remedy accorded to lessor by law. In the event lessee defaults under the terms and conditions of this agreement, the option to purchase above mentioned shall terminate upon

lessor giving lessee a notice to cure, which notice is not cured within thirty (30) days of any such notice.

QUIET ENJOYMENT:

The lessor does covenant with the lessee that the lessee upon paying the rent and performing the covenants aforesaid, shall and may peacefully and quietly have, hold and enjoy the said premises for the full term of this lease.

In Witness Whereof, all parties have hereunto set their hands the day and year first above written.

LESSOR:
BANK OF HOVEN, a South Dakota Banking Corporation

By: /s/ James Nielsen
Its: Asst. V.P.

(CORPORATE SEAL)

LESSEE:
LONG FAMILY LAND AND CATTLE COMPANY, INC.

By: /s/ Ronnie Long pres.
Its: _____

(CORPORATE SEAL)

State of South Dakota )
) ss
County of Potter )

On this 5th day of December, 1996, before me, the undersigned officer, personally appeared James

Nielsen who acknowledged himself to be the Assistant V.P. of Bank of Hoven, a South Dakota Banking Corporation, lessor, and that he, as such Assistant V.P, being authorized to do so, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as Assist. V.P..

In Witness Whereof, I hereunto set my hand and official seal.

/s/ David A. Von Wald
Notary Public

My Commission Expires
July 22, 2001

(SEAL)

State of South Dakota )
) ss
County of Potter )

On this 5th day of December, 1996, before me, the undersigned officer, personally appeared Ronnie Long who acknowledged himself to be the President of Long Family Land and Cattle Company, Inc., a Corporation, lessee, and that he, as such President, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as President.

In Witness Whereof, I hereunto set my hand and official seal.

/s/ David A. Von Wald
Notary Public

My Commission Expires
July 22, 2001

(SEAL)

**[EXHIBIT 5]**

Loan agreement between Long Family Land and Cattle Co. Inc. and the Bank of Hoven.

The Bank of Hoven has received a deed to property described in exhibit A attached here to, through the estate of Kenneth Long. The Bank of Hoven will credit Long Family Land and Cattle Co. Inc. from the sale proceeds as follows:

| | | |
|---|---|---|
| Credit for land | $468,000.00 | |
| Credit for house | $ 10,000.00 | |
| | $478,000.00 | |
| Less State Enhancement payoff | | $82,447.88 |
| Less past due taxes | | $23,314.38 |
| Less attorneys fees | | $ 9,540.10 |
| Less title search | | $ 473.00 |
| Less title ins | | $1,118.25 |
| Less payment in full of note #98179 [RENOTE] | | $206,566.16 |
| Less payment in full of note #2002 [BIA Subordination] | | $50,301.51 |
| Less payment in full of note 2470 [Emergency Feed Note] | | $5,312.69 |

| | |
|---|---|
| Less payment in full of note #1866 (Ronnie & Lila Long) | $3,928.56 |
| Less payment in full of note #98262 [BIA Guaranteed Note 84%] | $60,669.21 |
| Less partial payment on note #98809 [BIA Guaranteed Note 80%] | $34,328.26 |
| | $478,000.00 |

The Bank of Hoven will request, from the BIA, to increase the guarantee to 90% and to reschedule note #98181 (prin, int. and late charges), over 20 years with an annual payment from crop and yearling sales. Primary security will be cows, bulls and machinery. The Bank of Hoven will also request a 90% BIA guarantee on a $70,000.00 annual operating loan. This note will be secured by a 2nd lien on calves, yearlings, and a first lien on crops, and will be paid down to $1.00 annually.

If the BIA guarantee requests are approved, then the Bank of Hoven will make a loan to Long Family Land and Cattle Co. Inc. for $53,500.00 to pay off the balance of note #98809 for approximately $17,000.00, with $37,500.00 to be used to purchase 110 calves to be fed and pastured with their own calves. The sale proceeds from wheat, millet, and 10hd of assorted yearlings will be applied to note #98809 first with any balance to be applied to the $53,500.00 note. The Bank of Hoven will have a 1st security interest on all

calves and yearlings and will apply those sales to the $53,500.00 note first.

The Bank of Hoven will enter into a lease/purchase option on the approximately 2230 acres of land only described in exhibit A, under a separate agreement attached hereto.

Dated this 5th day of Dec, 1996

Long Land and Cattle Co. Inc.

by /s/ Ronnie Long pres.
by /s/ Lila Long Sec. Treasure

Bank of Hoven

by /s/ James Nielsen A V.P.

**[EXHIBIT 6]**

BH *BANK OF HOVEN*

December 12, 1996

Russell McClure, Supt.
Cheyenne River Sioux Tribe
Box 590
Eagle Butte, SD 57625

Re: Long Family Land and Cattle Co. Inc.

Dear Mr. McClure:

The Bank of Hoven is requesting to restructure its current BIA guarantee loan #98181 in the approximate amount of $415,000.00 over 20 years @9.25% variable, payable in annual payments. We would also request an $85,000.00 line of credit for operating expenses. The Bank would also make a direct loan on a LIFO basis of approximately $41,000.00 to purchase 110 calves for $37,500.00 and to refinance BIA guarantee note #98809, after applying the proceeds from 10 hd of yearlings, wheat and millet sales.

This restructing [sic] we feel is in the best interest of the borrower to allow them some time to work through this low cattle market and will lessen the chance for the U.S. Gov't of the Bank calling the guarantee. The Long's have deeded some real estate to the Bank for credit on their loans, and are leasing this real estate from the Bank, and with this reduction in debt and a restructing [sic] of the existing debt we feel that the operation can cash flow even during this low cattle price cycle and begin to rebuild the financial structure

of the ranching operation. We have enclosed the financial statements and cash flows to support this position.

We would request that the guarantee % be increased to 90% on note # 98181 and that the line of credit be a 90% guarantee. We hope that you can look favorably on this request to allow the Long's to continue on in their life long ranching operation.

Thank you.

Sincerely yours,

James Nielsen, AVP

## [EXHIBIT 3]

## PERSONAL REPRESENTATIVE'S DEED

Paulette Long as the duly appointed, qualified and acting personal representative of the estate of Kenneth L. Long, deceased, grantor, for valuable consideration, sells, conveys, transfers, assigns and releases to Bank of Hoven, grantee, of Hoven, South Dakota, 57650, P.O., all interest of the decedent and the estate of the decedent in the following described real estate in Dewey County, South Dakota:

Township 15 North, Range 24 E.B.H.H.:
Section 1: E½

Township 17 North, Range 25 E.B.H.H.:
Section 25: NW¼
Section 28: All
Section 32: E½
Section 33: NE¼, W½NE¼NW¼, SE¼NE¼NW¼, W½NW¼ & SE¼NW¼ & S½
Section 34: SW¼

Lot 7 and south 40 feet of Lot 8, Block 29 in the Town (now City) of Timber Lake, South Dakota, together with improvements thereon, subject to easements and restrictions of record.

Exempt from transfer fee
SDCL 43-4-22(6)

Dated December 10, 1996

s/ Paulette Long
Paulette Long
Box 186
Timber Lake, SD 57656
605 865-3332

STATE OF SOUTH DAKOTA )
: SS
COUNTY OF DEWEY )

On December 23, 1996, before me personally appeared Paulette Long known to me or satisfactorily proven to be the person described in the Personal Representative's Deed and acknowledged that she executed the foregoing Personal Representative's Deed as personal representative of the estate of Kenneth L. Long, deceased, and for the purposes therein contained.

s/ Andrew Aberle
Andrew Aberle,
Notary Public South Dakota

My Commission Expires:
10/15/98
(SEAL)✓

THIS INSTRUMENT
PREPARED BY:

ABERLE & ABERLE
BOX 236
TIMBER LAKE SD 57656
(605) 865-3528

OFFICE OF REGISTER OF DEEDS

STATE OF SOUTH DAKOTA )
) ss.
County Of Dewey )

I hereby certify that the within instrument was filed in this office for record on the 27th day of December A.D. 1996 at 10:30 o'clock A.M., and was duly recorded in Book 39 of Deeds on Page 1

s/ [Illegible]
Register of Deeds

(SEAL)✓

Fee $5.00

By _____ Deputy

[ATTACHMENT 4]

BH *BANK OF HOVEN*

January 16, 1997

Dennis Huber
ND/SD Indian Business Development Center
Bismarck, N.D. 58504

Dear Dennis,

The Bank of Hoven has received a deed to property previously owned by Kenneth Long, Timber Lake, S.D. worth $468,000.00 on farm and range real estate and $10,000.00 on a house in Timber Lake. This value of $478,000.00 has been used to pay off prior real estate debt, taxes, attorney fees, title fees and bank debt owed by Long Family Land and Cattle Co., Inc., Timber Lake, S.D.

Longs are also in the process of receiving a rescheduling of the remaining present BIA guaranteed debt of $343,874.42 over a 20 year term. They will also be receiving a BIA guaranteed operating loan for $70,000.00 for annual operating expenses. Upon receiving the BIA guarantee shortly, they will also receive a direct bank loan for $53,500.00 to be used to refinance bank debt and purchase feeder cattle.

These credits and loans would not have been possible without your expertise and assistance. We appreciate your efforts in helping the bank secure this loan package and reduction of bank debt for the Longs.

Please all me at the bank if you have any questions on the above information. Thank You!

Sincerely,

/s/ Charles Simon

Charles Simon, VP
Bank of Hoven
P.O. Box 7
Hoven, S.D. 57450

**Monthly Cash Flow (Agri-Business)**

**Name:** Ron Long

**Year 1**

**Date:** 11/96 to 10/97

| Month | 11 | 12 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cash, beginning: | | ($28,227) | ($31,777) | ($35,327) | ($42,877) | ($46,427) | ($50,777) | ($69,827) | ($77,377) | ($80,927) | ($84,477) | $54,373 | $0 |
| Grain | $12,125 | 96 wheat and millet. | | | | | | | 200 @ 25 @ $3.50 | | $17,500 | | $29,625 |
| Int subsidy and CRP | $22,000 | | | | | | | | | | | $44,168 | $66,168 |
| Calf sales 50% 135 @ $350 | | | | | | | | | | | | $47,250 | $47,250 |
| Yearling sales | $4,800 | 10 @ $480 | | | | | | | | 320 @ $520 | $166,400 | | $171,200 |
| 37,500 + $3,000; 40 Culls @ $300 | $52,500 | | | | | | | | | | | | $52,500 |
| **Cash available:** | **$91,425** | **($28,227)** | **($31,777)** | **($35,327)** | **($42,877)** | **($46,427)** | **($50,777)** | **($69,827)** | **($77,377)** | **($80,927)** | **$99,423** | **$145,791** | **$366,743** |
| **Operating Expenses:** | | | | | | | | | | | | | |
| Car & Truck | | | | | | | | | | | | | $0 |
| Chemicals | | | | | | | | $4,000 | | | | | $4,000 |
| Conservation | | | | | | | | | | | | | $0 |
| Custom Hire (machine work) | | | | | | | | | | | | | $0 |
| Depreciation | | | | | | | | | | | | | $0 |
| Employee Benefits | | | | | | | | | | | | | $0 |
| Feed | $19,800 | | | | | | | | | | | | $19,800 |
| Fertilizers | | | | $4,000 | | | | | | | | | $4,000 |
| Freight & Trucking | | | | | | | | | | | | | $0 |
| Gasoline, Fuel & Oil | $700 | $700 | $700 | $700 | $700 | $1,100 | $1,700 | $700 | $700 | $700 | $1,700 | $2,700 | $12,800 |
| Insurance (other than health) | $4,000 | | | | | | | | | | | | $4,000 |
| Interest – other | | | | | | | | | | | | $9,809 | $9,809 |
| Labor hired | $600 | $600 | $600 | $600 | $600 | $1,000 | $1,000 | $600 | $600 | $600 | $600 | $600 | $8,000 |
| Pension & Profit-sharing | | | | | | | | | | | | | $0 |
| Rent or lease (Eqmt., etc.) | | | | | | | | | | | | | $0 |
| Rent or lease (Animals, Land) | $16,702 | | | | | | $7,000 | | | | | | $23,702 |
| Repairs & Maintenance | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $4,800 |
| Seeds and plants | | | | | | | $3,600 | | | | | | $3,600 |
| Storage and warehousing | | | | | | | | | | | | | $0 |
| Supplies | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $2,400 |
| Taxes | $3,500 | | | | | | $3,500 | | | | | | $7,000 |
| Utilities | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $4,200 |
| Veterinary, breeding & medicine | $6,600 | | | | | | | | | | | | $6,600 |
| Miscellaneous (specify) | | | | | | | | | | | | | $0 |
| **Total Cash Expenses:** | **$52,852** | **$2,250** | **$2,250** | **$6,250** | **$2,250** | **$3,050** | **$17,750** | **$6,250** | **$2,250** | **$2,250** | **$3,250** | **$14,059** | **$114,711** |

**OTHER DISBURSEMENTS:** 1) Advance on calves and purchase $40,500 2) OLC 3) BIA term note $415,000 20 yrs 9.25% $46,246 4) Lease/purchase option w/bank $44,168

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Capital expenditures | $12,000 | 20 cows @ $600 | | | | | | | | | 20 ~~12~~ cows @ $600 | $12,000 | $24,000 |
| Livestock purchases | $53,500 | Lvstk purchase and note 98809 payoff | | | | | | | | | | | $53,500 |
| Owner's withdrawal | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $15,600 |
| Loan repayment | | | | | | | | | | | $40,500 | $90,414 | $130,914 |
| **Total Other Disbursements:** | **$66,800** | **$1,300** | **$1,300** | **$1,300** | **$1,300** | **$1,300** | **$1,300** | **$1,300** | **$1,300** | **$1,300** | **$41,800** | **$103,714** | **$224,014** |
| **Total Cash Disbursements:** | **$119,652** | **$3,550** | **$3,550** | **$7,550** | **$3,550** | **$4,350** | **$19,050** | **$7,550** | **$3,550** | **$3,550** | **$45,050** | **$117,773** | **$338,725** |
| **TOTAL CASH ENDING:** | **($28,227)** | **($31,777)** | **($35,327)** | **($42,877)** | **($46,427)** | **($50,777)** | **($69,827)** | **($77,377)** | **($80,927)** | **($84,477)** | **$54,373** | **$28,018** | **$28,018** |

**Monthly Cash Flow (Agri-Business)**

**Name:** Ron Long

**Year 2**

**Date:** 11/97 to 10/98

| Month | 11 | 12 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cash, beginning: | $28,018 | $42,965 | $4,415 | $865 | ($6,685) | ($10,235) | ($14,585) | ($33,635) | ($41,185) | ($44,735) | ($48,285) | $56,115 | $28,018 |
| Grain | | | | | | | | | 200 @ 25 @ $3.50 | | $17,500 | | $17,500 |
| Int subsidy and CRP | $11,294 | | | | | | | | | | | $44,168 | $55,462 |
| Calf sales 50% 144 @ $375 | | | | | | | | | | | | $54,000 | $54,000 |
| Yearlings 235 @ $550 | | | | | | | | | | | $129,250 | | $129,250 |
| 135 @ $280, 20 Culls @ $400 | $45,800 | | | | | | | | | | | | $45,800 |
| **Cash available:** | **$85,112** | **$42,965** | **$4,415** | **$865** | **($6,685)** | **($10,235)** | **($14,585)** | **($33,635)** | **($41,185)** | **($44,735)** | **$98,465** | **$154,283** | **$330,030** |
| **Operating Expenses:** | | | | | | | | | | | | | |
| Car & Truck | | | | | | | | | | | | | $0 |
| Chemicals | | | | | | | | $4,000 | | | | | $4,000 |
| Conservation | | | | | | | | | | | | | $0 |
| Custom Hire (machine work) | | | | | | | | | | | | | $0 |
| Depreciation | | | | | | | | | | | | | $0 |
| Employee Benefits | | | | | | | | | | | | | $0 |
| Feed | $10,395 | | | | | | | | | | | | $10,395 |
| Fertilizers | | | | $4,000 | | | | | | | | | $4,000 |
| Freight & Trucking | | | | | | | | | | | | | $0 |
| Gasoline, Fuel & Oil | $700 | $700 | $700 | $700 | $700 | $1,100 | $1,700 | $700 | $700 | $700 | $1,700 | $2,700 | $12,800 |
| Insurance (other than health) | $4,000 | | | | | | | | | | | | $4,000 |
| Interest – other | | | | | | | | | | | | $929 | $929 |
| Labor hired | $600 | $600 | $600 | $600 | $600 | $1,000 | $1,000 | $600 | $600 | $600 | $600 | $600 | $8,000 |
| Pension & Profit-sharing | | | | | | | | | | | | | $0 |
| Rent or lease (Eqmt., etc.) | | | | | | | | | | | | | $0 |
| Rent or lease (Animals, Land) | $16,702 | | | | | | $7,000 | | | | | | $23,702 |
| Repairs & Maintenance | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $400 | $4,800 |
| Seeds and plants | | | | | | | $3,600 | | | | | | $3,600 |
| Storage and warehousing | | | | | | | | | | | | | $0 |
| Supplies | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $200 | $2,400 |
| Taxes | $3,500 | | | | | | $3,500 | | | | | | $7,000 |
| Utilities | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $350 | $4,200 |
| Veterinary, breeding & medicine | $4,000 | | | | | | | | | | | | $4,000 |
| Miscellaneous (specify) | | | | | | | | | | | | | $0 |
| **Total Cash Expenses:** | **$40,847** | **$2,250** | **$2,250** | **$6,250** | **$2,250** | **$3,050** | **$17,750** | **$6,250** | **$2,250** | **$2,250** | **$3,250** | **$5,179** | **$93,826** |

1) Advance on calves 135 @ $280 $37,800 2) OLC

**OTHER DISBURSEMENTS:** 3) BIA term note $415,000 20yrs 9.25% $46,246 4) Lease/purchase option w/bank $44,168

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Capital expenditures | | | | | | | | | | | | | $0 |
| Livestock purchases | | $35,000 | 100 yrlg @ $350 | | | | | | | | $37,800 | | $72,800 |
| Owner's withdrawal | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $1,300 | $15,600 |
| Loan repayment | | | | | | | | | | | | $90,414 | $90,414 |
| **Total Other Disbursements:** | **$1,300** | **$36,300** | **$1,300** | **$1,300** | **$1,300** | **$1,300** | **$1,300** | **$1,300** | **$1,300** | **$1,300** | **$39,100** | **$91,714** | **$178,814** |
| **Total Cash Disbursements:** | **$42,147** | **$38,550** | **$3,550** | **$7,550** | **$3,550** | **$4,350** | **$19,050** | **$7,550** | **$3,550** | **$3,550** | **$42,350** | **$96,893** | **$272,640** |
| **TOTAL CASH ENDING:** | **$42,965** | **$4,415** | **$865** | **($6,685)** | **($10,235)** | **($14,585)** | **($33,635)** | **($41,185)** | **($44,735)** | **($48,285)** | **$56,115** | **$57,390** | **$57,390** |

[ATTACHMENT 5]

[SEAL] United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Aberdeen Area Office
115 Fourth Avenue S.E.
Aberdeen, South Dakota 57401

REPLY REFER TO:

Community Services/Economic Development
MC-305

FEB 14 1997

James Nielsen
Assistant Vice President
Bank of Hoven
P.O. Box 7
Hoven, South Dakota 57625

Dear Mr. Nielsen:

This letter is to recap your conversation with Loan Specialist, Stacey Johnston on February 3, 1997 and respond to your December 12, 19976 submittal on the Long Family Land Cattle Co. Inc.

Your December 12, 1997 6 request involved a restructure of the term guaranty, a new $85,000 line of credit, a LIFO on $41,000 to purchase livestock, and an increase of the guaranty percentage. Loan Specialist, Stacey Johnston informed you that this kind of request would have to be viewed as a modification, which requires a more complete application. Modification criteria is clearly outlined in your Loan Guaranty Agreement and 25 CFR 103.21. This reference

material is the basis for our programs and should be adhered to when requesting, modifying, servicing and collecting guaranteed loans.

We understand the emergency situation caused by the severe winter conditions. Therefore, we concur with a loan for emergency expenses. These expenses should be documented and readily available to the Agency Superintendent. This decision is made with the intention of preserving collateral. Refer to 25 CFR 103.22 for further direction and documentation.

We will not act on your December 12, 19976 requests until we receive a complete application. Under separate cover, we are again sending a copy of 25 CFR 103.

/s/ [Illegible]
Area Director

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**[EXHIBIT 14]**

February 18th, 1997

Bank of Hoven
PO Box 7
Hoven, SD 57450

RE: Ronnie Long
Box 272
Timber Lake, SD 57656

Dear Jim,

December 5th, 1996 – I was in Hoven and discussed future plans about my cattle operation.

December 11th, 1996 – Jim Nielsen faxed papers to John Lemke's office. All that was needed is Stacey Johnston's and the Area Director's signatures.

After deciding that we were going to keep the calves and run for yearlings; I went down on 12-13-96 and plowed a road, cleaned and set up corrals. I called Tim Bollinger and lined up trucks for 12-15-96 to haul cattle out. 12-14-96 was planned to bunch the cattle.

December 13th, 1996 PM – it started to blizzard for five days through December 18th, 1996. Everything that was opened on the 13th of December blew shut and county roads were completely blocked.

From this point on when the county roads did get opened and it was possible to get in with a tractor (as I had left my tractor at Doc Pesicka's) we fed. When

we couldn't get in with the tractor; we took snowmobiles in and caked the cows.

It was impossible to get the cattle out. If we could have gotten them out it was impossible to get them back to Headquarters due to the county roads not being wide enough for semitractor-trailers until January 29, 1997. This is when Mike Peterson widened our road with a CAT.

February 2nd, 1997 – Mike Peterson went down and plowed the cows out. Contrary to the malicious rumors that they were plowed out two or three times and not moved; this is the only time they were plowed out.

Between 12-14-97 & 2-2-97 I had trucks lined up three separate times. The reason being is Tribal emergency snow plowing was to plow me out and never did because it would storm and they would send their equipment elsewhere.

If there is any questions about plowing my cattle out contact Dewey County Highway Superintendent, Gregg Bourland, Tim Bollinger (trucker) or Mike Peterson who plowed me out.

In the result of not having the Kenneth Long Estate settled and operating money NOT available they [sic] hay and cattle were never removed. Also, the cattle never got insured which the blanket insurance would have cost approximately $2,000.00 covering the cattle plus. The insurance was brought to everyone's attention the first part of December.

The cattle were in the best location possible for most winters, but due to blocked roads and bad weather conditions it was impossible to get feed to them on a daily basis.

I had minimal losses until the blizzard of January 15th & 16th when the wind chill was 50 to 80 degrees below zero and the cattle that drifted out of the draws are the ones that died.

In light of all of this, the persons who start these vicious rumors must be trying to make themselves look better in the eyes of the bank. I feel bad enough losing these cattle let alone people starting false accusations.

Sincerely,

/s/ Ronnie Long
Ronnie Long

CC John Lemke, CRST Credit Officer
Russell McClure, Cheyenne River Agency Superintendent
Stacey Johnston, Area Loan Specialist
Delbert Brewer, Area Director

**[EXHIBIT 9]**

BH *BANK OF HOVEN*

March 27, 1997

Ronnie Long
Box 272
Timber Lake, SD 57656

Dear Ronnie;

The Bank of Hoven Loan Committee has approved a closed end operating loan in the amount of $40,595.00 under a LIFO agreement with the BIA upon the following conditions being met:

3) Written concurrence from the BIA that renewal of notes #98181 and #98809 with the interest being paid from the renewal note, that the interest subsidy would be honored.

4) The current inventories of wheat and millet will be sold by 6-15-97, with 50% of the proceeds being applied to the LIFO note and 50% released to Longs for expenses listed on the cash flow.

5) The pasture will be rented prior to closing with a written contract (a copy provided to the bank) and in the amount listed on the cash flow, 50% of the proceeds will be applied to the LIFO note with 50% releases to Longs for expenses listed on the cash flow.

6) The Longs will provided [sic] a current and accurate list of accounts payable, signed, to the Bank prior to closing.

7) The Longs agree not to overdraw any checking account at the Bank of Hoven, any overdraft will terminate the operating loan and releases of proceeds.

8) All other sales proceeds will be applied first to the LIFO note, then to the term notes until all loans are current to the 1st of November 1997.

9) Proceeds released from the pasture rent or current wheat and millet sales will be place [sic] in an escrow savings account, withdrawals from the escrowed savings account or advances on the LIFO note will require a signed draw slip which details the items being advanced for or withdrawn for, all expenditures exceeding $250.00 will require a signed receipt.

10) The Longs may utilize the CRP acres for the special 1997 calving program; the total "cows to be placed in the CRP will be 138 cows & their calves and will be removed prior to 5-1-97; the Longs will adhere to all other provisions [illegible] program."

/s/ Ronnie Long
Ronnie Long

/s/ Lila Long
Lila Long

/s/ James Nielsen AVP
Bank of Hoven

/s/ Letter from Russell McClure dated [illegible]
BIA Representative

Sincerely yours

/s/ James Nielsen
James Nielsen, AVP

**[ATTACHMENT 10]**

[SEAL] United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Cheyenne River Agency
Eagle Butte, South Dakota 57625

IN REPLY REFER TO:

Administration

April 1, 1997

Jim Nielsen, Asst Vice pres.
Bank of Hoven
PO Box 7
Hoven, SD 57450

RE: Ronnie Long

Dear Mr. Nielsen,

This letter is in response to your letter dated March 27, 1997. This office is in concurrence with the request as stated in the following conditions:

1) This commitment and the letter of March 27, 1997 are to be a part of the loan closing documents.

2) Notes 2960, 3039 and 3040 to be included in the LIFO operating note.

3) Note 98181 to be scheduled for 20 years with 84% and note 98809 to be scheduled for 20 years with 80% guarantees.

4) Interest subsidy is to [sic] applied to notes 98181 and 98809. Interest subsidy to be continued for an additional year with an option to renew for another year pending request and approval.

5) All funds to be advanced and applied as agreed by the lender and borrower.

6) Rental contracts on the CRP are to be concurred upon by both parties before any use of the CRP is utilized. This section is to ensure the adherence to the terms and conditions of the CRP contract are not jeopardized. This contract is vital to the overall contract.

7) Where this reamortization involves guarantees that were incurred under commitment Orders dated Feb 26, 1992 and June 2, 1992, those Orders shall also be attached to this order.

8) This commitment is contingent upon applicant's full and complete compliance with requirements of the National Environmental Protection Act (NEPA). No funds shall be disbursed prior to BIA receipt of written documentation confirming compliance with NEPA requirements.

Sincerely,

/s/ Russell J. [Illegible]

Agency Superintendent
Cheyenne River Agency

Accepted by the Bank of Hoven, Hoven, South Dakota

| 4-1-97 | /s/ James Nielsen |
| --- | --- |
| Date | Signature |
| | Assist VP |
| | Title |

**[ATTACHMENT 2]**

**GUARANTY**

HOVEN (City), SD (State)

APRIL 1, 1997

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce BANK OF HOVEN, P.O. BOX 7, HOVEN, SD 57540 (herein, with its participants, successors and assigns, called "Lender"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of LONG FAMILY LAND & CATTLE CO. INC. (herein called "Borrower") or to engage in any other transactions with Borrower, the Undersigned hereby absolutely and unconditionally guarantees to Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

A. If this ☒ is checked, the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: LOANS TO LONG FAMILY LAND AND CATTLE CO. INC. and any extensions, renewals or replacements thereof (hereinafter referred to as the "Indebtedness").

1) Written concurrence from the BIA for the balance remaining on the protective advance loans to be paid from an advance on the LIFO operating loan:

| | | |
|---|---|---|
| #2960 Leases | Prin. Balance | $11,436.02 |
| #3039 Emergence operating | Prin. Balance | $ 5,000.00 |
| #3040 Snowmobile | Prin. Balance | $ 2,250.00 |

2) Written approval from the BIA to reschedule the existing BIA guaranteed loans as follows:

| | | | |
|---|---|---|---|
| #98181 | 84% guarantee approximately | $420,000.00 | 20 yrs annual pmt. 9.50% V |
| #98809 | 80% guarantee approximately | $ 17,600.00 | 20 yrs annual pmt. 9.50% V |

B. If this ☐ is checked, the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s): _____

_____

The term "Indebtedness" as used in this guaranty shall not include any obligations entered into between Borrower and Lender after the date hereof (including any extensions, renewals or replacements of such obligations) for which Borrower meets the Lender's standard of creditworthiness based on Borrower's own assets and income without the addition of a guaranty, or for which a guaranty is required but Borrower chooses someone other than the joint Undersigned to guaranty the obligation.

The Undersigned further acknowledges and agrees with Lender that:

1. No act or thing need occur to establish the liability of the Undersigned hereunder, and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder.

2. This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to any renewals, extensions and refinancings thereof. If there be more than one Undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetence of the Undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by Lender and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the Undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) or revoke this guaranty, then the Lender shall have the right to declare immediately due and payable, and the Undersigned will forthwith pay to the

Lender, the full amount of all Indebtedness, whether due and payable or unmatured. If the Undersigned voluntarily commences or there is commenced involuntarily against the Undersigned a case under the United States Bankruptcy Code, the full amount of all Indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the Undersigned hereunder shall be limited to a principal amount of $ UNLIMITED (if unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received by or available to Lender on account of the Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder. If the liability of the Undersigned is limited to a stated amount pursuant to this paragraph 4, any payment made by the Undersigned under this guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the

Lender, advising the Lender that such payment is made under this guaranty for such purpose.

5. The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

This guaranty includes the additional provisions on page 2, all of which are made a part hereof.

This guaranty is ☐ unsecured; ☐ secured by a mortgage or security agreement dated _____; ☐ secured by _____.

IN WITNESS WHEREOF, this guaranty has been duly executed by the Undersigned the day and year first above written.

/s/ x Ronnie Long
RONNIE LONG

/s/ x Lila Long
LILA LONG

**[ATTACHMENT 22]**

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

ASSIGNMENT OF INTEREST

| | |
|---|---|
| Bank of Hoven 46-0108210 | Long Family Land & Cattle Co. Inc. |
| Lender I. D. No. | Borrower |
| PO Box 7 | Box 272 |
| Address | Address |
| Hoven, SD 57450 | Timber Lake, SD 57656 |
| Zip Code | Zip Code |
| G922D1A0103 5-15-92 | |
| Guaranty Certificate Number and Date | Insurance Agreement Number and Date |

1. In consideration of $ 378,340.23 received from the United States Government, representing 84 % of the net loss claimed by the Lender as provided in the Guaranty Certificate or Loan Insurance Agreement executed by the Commissioner of Indian Affairs, in the amount of $ 428,930.00 , the undersigned hereby grants, conveys, transfers, and sets over unto the United States Government all its right, title and interest, now and in the future to come, in the following promissory note and collateral securing documents.

2. Promissory note executed by Long Family Land & Cattle Co. Inc., dated 4-1-97, in the amount of $420,515.40, bearing interest at the rate of 9.50 % per annum, having a balance this date of $420,515.40 unpaid principal and $29,889.64 unpaid accrued interest. & Late Charges.

3. The following documents are hereby assigned to the United States Government:

   a) Promissory note dated 4-1-97, in the amount of $420,515.40.

   b) S/A dated 4-1-97 & 9-28-88

   c) S/A dated 1-8-97

   d) Personal Guarantees dated 4-1-97

   e) UCC/EFS dated 10-18-88

   f) Promissory Notes dated 4-1-97

Bank of Hoven
Lender

12-30-97
Date

By /s/ James E. Nielsen
Title AVP

**[ATTACHMENT 22]**

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

ASSIGNMENT OF INTEREST

| | |
|---|---|
| Bank of Hoven 46-010821 | Long Family Land & Cattle Co. Inc. |
| Lender I. D. No. | Borrower |
| PO Box 7 | Box 272 |
| Address | Address |
| Hoven, SD 57450 | Timber Lake, SD 57656 |
| Zip Code | Zip Code |
| G924C1A0113 2-22-93 | |
| Guaranty Certificate Number and Date | Insurance Agreement Number and Date |

1. In consideration of $ 14,628.32 received from the United States Government, representing 80 % of the net loss claimed by the Lender as provided in the Guaranty Certificate or Loan Insurance Agreement executed by the Commissioner of Indian Affairs, in the amount of $ 60,000.00, the undersigned hereby grants, conveys, transfers, and sets over unto the United States Government all its right, title and interest, now and in the future to come, in the following promissory note and collateral securing documents.

2. Promissory note executed by Long Family Land & Cattle Co. Inc., dated 4-1-97, in the amount of $ 17,604.73, bearing interest at the rate of 9.50 % per annum, having a balance this date of $ 17,604.73 unpaid principal and $ 680.68 unpaid accrued interest. & Late Charges.

3. The following documents are hereby assigned to the United States Government:

   a) Promissory note dated 4-1-97, in the amount of $ 17,604.73.

   b) S/A dated 4-1-97 & 9-28-88

   c) S/A dated 1-8-97

   d) Personal Guarantees dated 4-1-97

   e) UCC/EFS dated 10-18-88

   f)

Bank of Hoven
Lender

12-30-97
Date

By /s/ James E. Nielsen
Title AVP

**[ATTACHMENT 6]**

12/01/98

Steve Hageman, CEO
Bank of Hoven
P. O. Box 7
Hoven SD 57450

Dear Steve:

This letter is a request of a 60 day extension on the land that Ronnie long [sic] has deeded to Bank of Hoven. I have 4 possibilities of refinancing and paying the debt off against the land that the bank holds the deed on. This will allow me the necessary time to try and secure financing for this endeavor. I have a bank interested and will be looking at the land in the next day or two. I also have been working on investors and have a [sic] individual out of Nebraska that is interested and this will allow me time to work out the necessary details to make this a reality.

Ronnie Long

[ATTACHMENT 7]

FAX (605) 948-2198

**TELECOPIER COVER LETTER**

TO John Lemke or Harley Henderson DATE 12-2-98

FROM: Charles Simon, BOH # OF PAGES 1

RE: _____

_____

_____

COMMENTS/ACTION This letter will notify you and Ronnie Long that there will be no extension of time from the December 5, 1998 deadline for option to purchase. Possession of this property by lessee, Long Family Land and Cattle Company, Inc., will terminate on December 5, 1998.

/s/ [Illegible] VP

REPLY REQUESTED: YES( ) WHEN:_____
NO ( ) [Illegible]

**[EXHIBIT 15]**

QUIT CLAIM DEED – State Form

Bank of Hoven, A Corporation, PO Box 7

_____

_____ *grantor* __ *of* Porter _____

*County, State of* South Dakota _____ *for and in consideration of* Forty Nine Thousand Six Hundred Dollars and no/100---------- *Dollars, convey* ___ *and quit claim* ___ *to* Ralph H. Pesicka Jr. and Norma J. Pesicka _____ *the grantee* s *of* Timber Lake SD _ *P. O. all interest in the following described real estate in the County of* Dewey *in the State of South Dakota*:

East Half of Section One, Township Fifteen, Range Twenty Four (E½ 1-15-24) Dewey County, South Dakota.

Transfer Fee
$50.00 pd.

*Dated this* 17th *day of* March *19* 99

Bank of Hoven, A Corporation

/s/ [Illegible] VP

66494

*STATE OF SOUTH DAKOTA* )
) *ss*
*County of* Dewey )

*OFFICE of REGISTER of DEEDS*

*Filed for record the* 22nd *day of* March *19* 99 *at* 9 *o'clock and* 30 *Minutes* A. *M., and recorded in Book* 37 *of Deeds on page* 189 .

/s/ [Illegible]
*Register of Deeds.*

*By* _____
Fee $10.00 *Deputy*

Prepared by Nancy Rausch
Bank of Hoven
Box 7, Hoven, SD 57450
Phone 605-948-2216

*STATE OF SOUTH DAKOTA* )
) *ss*
*County of* Potter )

*On this the* 17th *day of* March , *19* 99 , *before me* Nancy K. Rausch, A Notary Public , *the undersigned officer, personally appeared* Brent Heinert , *known to me or satisfactorily proven to be the person whose name* _____ *subscribed to the within instrument and acknowledged that* ____*he*____ *executed the same for the purposes therein contained.*

*In witness whereof I hereunto set my hand and official seal.*

/s/ Nancy K. Rausch

A Notary Public

*Title of Officer*

NANCY K. RAUSCH
Notary Public, POTTER
COUNTY, S.DAK.
My Commission Expires

*My Commission expires:* APRIL 10, 2001

[EXHIBIT 17]

NOTICE TO QUIT

TO: Long Family Land & Cattle Co., Inc. and Ronnie Long

Notice is hereby given and demand made by Bank of Hoven to Long Family Land & Cattle Co., Inc. and Ronnie Long that you must immediately quit possession of the real estate described below and to remove all cattle or other livestock owned by you. Notice is further given that Bank of Hoven intends to seek the damages set out by SDCL 21-3-8 in the event you do not immediately terminate your possession of the real estate.

The East Half (E½) of Section One, Township Fifteen North, Range Twenty-four (1-15-24), East of the Black Hills Meridian;

The Northwest Quarter (NW¼) of Section Twenty-five (25), all of Section Twenty-eight (28), the East Half (E½) of Section Thirty-two (32), the Northeast Quarter (NE¼), the West Half of the Northeast Quarter of the Northwest Quarter (W½NE¼NW¼), the Southeast Quarter of the Northeast Quarter of the Northwest Quarter (SE¼NE¼NW¼), the West Half of the Northwest Quarter (W½NW¼) and the Southeast Quarter of the Northwest Quarter (SE¼NW¼) and the South Half (S½) of Section Thirty-three (33); and the Southwest Quarter (SW¼) of Section Thirty-four (34), all in Township Seventeen (17) North, Range Twenty-five (25), East of the Black Hills Meridian, subject to easements,

reservations and conveyances, if any, existing and of record, all in Dewey County, SD.

Dated this 19th day of May, 1999.

BANK OF HOVEN

/s/ Steve Hageman
By: Steve Hageman,
Its President

**[ATTACHMENT 9]**

**DAVID A. VON WALD**
**ATTORNEY-AT-LAW**
**P.O. BOX 488**
**HOVEN, SOUTH DAKOTA 57450**

**Telephone: (605) 948-2550**
**Fax: (605) 948-2236**
**E-Mail: dvonwald@sullybuttes.net**

June 4, 1999

Cheyenne River Sioux Tribal Court
Attention: Dale Charging Cloud
P.O. Box 120
Eagle Butte, South Dakota 57625

Re: Bank of Hoven v. Long Family Land & Cattle Co., Inc.

Dear Mr. Charging Cloud:

Enclosed please find a Notice to Quit which I would like served on Long Family Land & Cattle Co, Inc., Ronnie Long, President. Send your Return of Service with your billing to my office after service has been completed. I would appreciate it if you would serve it immediately. Thank you.

Sincerely,

/s/ David A. Von Wald
David A. Von Wald

DAVW/jh
Encl.

**[ATTACHMENT 10]**

CHEYENNE RIVER SIOUX TRIBE

CERTIFICATE OF SERVICE

I the undersigned CRST Tribal Officer received and served the NOTICE TO QUIT for Long Family Land & Cattle Co. on this 16 day of June 1999 at 1125 am/pm at Timber Lake, SD

/s/ [Illegible]
OFFICER, CHEYENNE RIVER SIOUX TRIBE

CASE INFORMATION

Letter of request from David A. Von Wald, Attorney At Law, P.O. Box 468, Hoven, SD 57450.

/s/ [Illegible] Long
RESIDENCE – Timber Lake Area

Reviewed and approved for service

/s/ Leisah [Illegible] Bluespruce — 6/15/99
Leisah Bluespruce Chief Judge — Date approved

Will be billed for $20.00 upon proof of service. Please return the Certificate of Service to the Court Administrator.

## [ATTACHMENT 11]

## CONTRACT FOR DEED

* * *

This Agreement, made and entered into and executed in duplicate this 25th day of June, 1999, by and between Bank of Hoven, a South Dakota Banking Corporation, of P.O. Box 7, Hoven, South Dakota 57450, Seller, and Edward Maciejewski and Mary Jo Maciejewski, husband and wife, as tenants in common and not as joint tenants, of HCR 64, Box 6, Timber Lake, South Dakota 57656, Buyers, WITNESSETH:

That for the consideration hereinafter named, the Seller has sold and does hereby agree to convey to the Buyers, by good and sufficient Warranty Deed, free and clear of all taxes, liens, and encumbrances, except as hereinafter provided, the real estate situated in Dewey County, South Dakota, described as follows:

Parcel One:

> The Northwest Quarter (NW¼) of Section Twenty Five (25), all of Section Twenty Eight (28), and the the Southwest Quarter (SW¼) of Section Thirty Four (34), all in Township Seventeen (17), Range Twenty Five, East of the Black Hills Meridian;

Parcel Two:

> The East Half (E½) of Section Thirty Two (32), the East Half (E½), the Southwest

Quarter (SW¼), the South Half of the Northwest Quarter (S½NW¼), the Northwest Quarter of the Northwest Quarter (NW¼NW¼), the South Half of the Northeast Quarter of the Northwest Quarter (S½NE¼NW¼), and the Northwest Quarter of the Northeast Quarter of the Northwest Quarter (NW¼NE¼NW¼) of Section Thirty Three (33), all in Township Seventeen (17), Range Twenty Five (25), East of the Black Hills Meridian;

all subject to easements, reservations, and conveyances if any, existing and of record,

upon the terms hereinafter stated, and the Buyers do hereby agree to purchase said real estate from the Seller, at the price, in the manner, and upon the terms hereinafter set forth.

PURCHASE PRICE:

The purchase price for the real estate described in Parcel One above is Two Hundred One Thousand Six Hundred Dollars ($201,600.00), and shall be paid as follows, to-wit: The sum of Forty Thousand Three Hundred Twenty Dollars ($40,320.00) shall be paid as a down payment, upon the execution of this contract and the remaining balance of purchase price in the amount of One Hundred Sixty One Thousand Two Hundred Eighty Dollars ($161,280.00) shall be paid in ten (10) equal amortized annual installment payments, with the first such installment payment due and payable on March 1, 2000, in the amount of Twenty Three Thousand Two Hundred Twenty Nine

and 59/100 Dollars ($23,229.59), and thereafter the sum of Twenty Two Thousand Two Hundred Twenty Nine and 59/100 Dollars ($23,229.59) is due and payable on the first day of March in each succeeding year until the final payment of Twenty Three Thousand Two Hundred Twenty Nine and 54/100 ($23,229.54) shall be due and payable on March 1, 2009. The deferred balance of purchase price in the amount of One Hundred Sixty One Thousand Two Hundred Eighty Dollars ($161,280.00) shall draw interest at the rate of 7.75% per annum, upon the balance thereof remaining unpaid from and after June 25, 1999, interest being included in the above mentioned installment payment, all according to the schedule thereof hereto annexed as Schedule "A", and by this reference thereto made a part hereof.

The purchase price for the real estate described in Parcel Two above is the sum of One Hundred Ninety Nine Thousand Five Hundred Dollars ($199,500.00) and shall be payable as follows: The sum of Thirty Nine Thousand Nine Hundred Dollars ($39,900.00) as a down payment shall be paid upon Buyers obtaining possession of Parcel Two, and the remaining balance of purchase price in the amount of One Hundred Fifty Nine Thousand Six Hundred Dollars ($159,600.00) shall be paid in ten (10) equal annual amortized installment payments with the first such payment due on March 1, after the year Buyers obtain possession for the crop year, and thereafter an equal annual amortized payment shall be due on the 1st day of March in each succeeding year, until the

full purchase price has been paid. The deferred balance of purchase price in the amount of One Hundred Fifty Nine Thousand Six Hundred Dollars ($159,600.00) shall draw interest at the rate of 7.75% per annum, upon the balance thereof remaining unpaid from and after the date of possession of said real estate.

ITEMIZED PURCHASE PRICE:

It is agreed between the parties hereto that the depreciable assets located on Parcel One are sold for $18,050.00 and on Parcel Two for $22,684.00.

PREPAYMENT:

The Buyers shall have the option or privilege of making payments in advance on either purchase price or interest, at any time, and in any amount.

POSSESSION DATE:

The Buyers shall be entitled to possession of Parcel One upon the payment of the down payment, and shall be entitled to possession of Parcel Two when the current lessee quits possession of the real estate, either voluntarily or involuntarily. It is specifically understood that Long Family Land & Cattle Company, Inc., is currently grazing cattle on Parcel Two, and Rhonda Long is living in a house located on Parcel Two and that the Bank of Hoven is in the process of evicting the lessee and Rhonda Long from said real estate. Due to the uncertainties of litigation, it is impossible to accurately predict when the lessee shall be evicted from the real estate, but that upon

either eviction or voluntary surrender of the real estate, by the past lessee, Buyers shall be entitled at that time to possession of said real estate or if eviction is not accomplished prior to June 1st of any year, then Buyers shall be entitled to possession by June 1st of the year following eviction.

MINERAL RIGHTS:

All right, title and interest which the Seller now has and holds in and to all oil, gas, and other minerals in and under said real estate, of every nature, are sold to the Buyers as part of the property sold under this Contract for Deed, for the consideration hereinbefore named, and shall pass to the Buyers by virtue of the Warranty Deed hereinafter referred to.

TAXES:

The Seller will pay the first half of the 1999 real estate taxes and the taxes for all prior years for Parcel One, and the Buyers shall pay the second half of the 1999 real estate taxes for Parcel One, which become due and a lien on January 1, 2000, and the taxes for all subsequent years before the same shall become delinquent.

FARM PAYMENTS:

The Seller shall be entitled to keep one-half of the agricultural subsidy payments or any other governmental farm payment for the year 1999 for Parcel One, and the Buyers shall be entitled to receive the remaining one-half.

PARCEL TWO:

In the year that Buyers obtain possession of Parcel Two, for the crop year, (which is defined as prior to June 1st of any year) the Buyers shall receive all government payments attributable to that year and pay the real estate taxes attributable to that year and the taxes for all subsequent years. Interest on the unpaid balance shall then commence on the date of possession of Parcel Two.

MACHINERY:

Currently Long Family Cattle Company, Inc., or Ronald Long, has machinery located on some of the above described real estate, and Seller, or its agent, or agents, shall be entitled to enter upon the real estate for the purposes of removing any machinery owned by Long Family Cattle Company, Inc., or Ronald Long.

TITLE INSURANCE AND WARRANTY DEED:

The Seller shall pay the costs of a policy of title insurance, and that when the full purchase price, together with all interest and taxes have been paid in full, the Seller shall make, execute and deliver to the Buyers, a good and sufficient Warranty Deed conveying said real estate to Buyers. Seller shall also pay the transfer fee.

TIME OF ESSENCE:

The time of payment of said annual payments of purchase price, together with principal and interest,

along with all taxes, shall be considered as of the essence of this contract and that a failure to pay such purchase price, interest or taxes before they become delinquent, shall constitute a default in the terms and conditions of this contract, and thereupon the Seller may, at its option, declare the full amount unpaid under this contract to be due and payable forthwith, and may, at its option, proceed to foreclose this contract, or to pursue any other remedy accorded to it by law.

BINDING EFFECT:

All of the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, personal representatives, successors and assigns of the respective parties hereto.

IN TESTIMONY WHEREOF, all of the parties have hereunto set their hands and seals this day and year first mentioned above.

SELLER:

BANK OF HOVEN, a South Dakota Banking Corporation,

By: /s/ Stephen Hageman
Its President

BUYERS:

/s/ Edward Maciejewski
Edward Maciejewski

/s/ Mary Jo Maciejewski
Mary Jo Maciejewski

State of South Dakota )
) ss
County of Potter )

On this 25th day of June, 1999, before me, the undersigned officer, personally appeared Stephen A. Hageman, who acknowledged himself to be the President of the Bank of Hoven, a South Dakota Banking Corporation, and that he, as such president, being authorized so to do, executed the foregoing instrument for the purposes therein contined, by signing the name of the corporation by himself as President.

In Witness Whereof, I hereunto set my hand and official seal.

/s/ Brent Heinert
Notary Public

My Commission Expires:

11/1/2004

(SEAL)

[SEAL] BRENT HEINERT [SEAL]
NOTARY PUBLIC
SOUTH DAKOTA

State of South Dakota )
) ss
County of Potter )

On this 25th day of June, 1999, before me, the undersigned officer, personally appeared Edward Maciejewski and Mary Jo Maciejewski, Buyers,

known to me to be the persons whose names are subscribed to the within and foregoing instrument and acknowledged that they executed the same for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official seal.

/s/ Brent Heinert
Notary Public

My Commission Expires:

11/1/2004

(SEAL)

[SEAL] BRENT HEINERT [SEAL]
NOTARY PUBLIC
SOUTH DAKOTA

Prepared By: David A. Van Wald, Attorney

Address: P.O. Box 468
Hoven, South Dakota 57450
Telephone: (605) 948-2550
Fax: (605) 948-2236

## SCHEDULE "A"

06-25-1999 **** AMORTIZATION SCHEDULE **** 09:31:14



| Payment # | Date | (Actual/365) Interest | Principal | Page 1 Balance |
|---|---|---|---|---|
| 10 | 06/25/99 | 7.750% | $161280.00 | $161280.00 |
| 1 | 03/01/00 | 8561.10 | 14668.49 | 146611.51 |
| YEAR | 2000 | 8561.10 | 14668.49 | 146611.51 |
| 2 | 03/01/01 | 11362.39 | 11867.20 | 134744.31 |
| YEAR | 2001 | 11362.39 | 11867.20 | 134744.31 |
| 3 | 03/01/02 | 10442.68 | 12786.91 | 121957.40 |
| YEAR | 2002 | 10442.68 | 12789.91 | 121957.40 |
| 4 | 03/01/03 | 9451.70 | 13777.89 | 108179.51 |
| YEAR | 2003 | 9451.70 | 13777.89 | 108179.51 |
| 5 | 03/01/04 | 8406.88 | 14822.71 | 93356.80 |
| YEAR | 2004 | 8406.88 | 14822.71 | 93356.80 |
| 6 | 03/01/05 | 7235.15 | 15994.44 | 77362.36 |
| YEAR | 2005 | 7235.15 | 15994.44 | 77362.36 |
| 7 | 03/01/06 | 5995.58 | 17234.01 | 60128.35 |
| YEAR | 2006 | 5995.58 | 17234.01 | 60128.35 |
| 8 | 03/01/07 | 4659.95 | 18569.64 | 41558.71 |
| YEAR | 2007 | 4659.95 | 18569.64 | 41558.71 |
| 9 | 03/01/08 | 3229.62 | 19999.97 | 21558.74 |
| YEAR | 2008 | 3229.62 | 19999.97 | 21558.74 |
| 10 | 03/01/09 | 1670.80 | 21558.74 | 0.00 |
| YEAR | 2009 | 1670.80 | 21558.74 | 0.00 |

Payment Amount $23229.59
Final Payment Amount $2322.54

**[EXHIBIT 20]**

IN CIVIL COURT
CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION

**********

LONG FAMILY LAND AND
CATTLE COMPANY, INC. –
RONNIE AND LILA LONG,

Plaintiffs,

vs. **AMENDED COMPLAINT**

EDWARD AND MARY MACIEJEWSKI
and RALPH H. AND NORMA J. PSICKA,
and THE BANK OF HOVEN,

Defendants. R-120-99

**********

COME NOW Long Family Land and Cattle Company, Inc. (hereinafter referred to as the Company) and Ronnie and Lila Long, through their attorney, James P. Hurley, and for their Amended Complaint state and allege as follows:

I

JURISDICTION

This Court has jurisdiction over the parties and the subject matter involved in this case.

personal representative's deed for the real estate and home in Timber Lake to the Bank. JA 113-15.

### D. The Contracts

Two contracts underlie this suit: a loan agreement and a lease with option to purchase. JA 96-106. Neither contract is between the Bank and Ronnie Long or Lila Long in their individual capacities. Ronnie Long signed both the loan agreement and the lease with option to purchase in his capacity as president of the Long Company. JA 101, 106. Lila Long signed the loan agreement in her capacity as secretary treasurer of the Long Company. JA 106.

The Bank and the Long Company entered into a loan agreement on December 5, 1996. JA 104-06. Under the terms of the loan agreement, the Bank credited the Long Company debt for the farm real estate, and the home in Timber Lake deeded to the Bank. JA 104. The loan agreement required the Bank to request that the BIA increase the guarantee on one outstanding Long Company loan from 84% to 90%, and to reschedule payment of the delinquent note over 20 years. JA 105. The Bank also was to request that the BIA provide a 90% guaranty for a new operating loan. *Id.* "If the BIA guarantee requests are approved," the Bank was to make an additional loan of $53,500 to the Long Company. *Id.*

The Bank and the Long Company also entered into a two-year lease with the option to purchase the

pasture farm real estate on December 5, 1996. JA 96-103. The option price was $468,000. JA 98.

**E. The Relationship**

By letter dated December 12, 1996, the Bank fulfilled its obligation to request the agreed BIA guarantees. JA 107-08.

During the winter, while the BIA request was pending, the Bank issued loans to the Long Company totaling approximately $24,000. Simon Aff. at ¶ 10. The BIA provided no response until February 14, 1997, when it rejected the Bank's application as incomplete. JA 118-19. By that time, most of the cattle the Long Company had proposed to use as collateral for the loans had perished in harsh winter conditions. JA 120-22. Because the BIA rejected the application, and the contemplated loan could no longer be sufficiently collateralized, the Bank did not make the loan, though it did provide subsequent additional financing. Simon Aff. at ¶¶ 8-9.

The Long Company failed to exercise its option to purchase the farm real estate in December 1998. On March 17, 1999, with the Long Company still in possession of approximately 960 acres, the Bank sold 320 acres of pasture land to Ralph and Norma Pesicka, who are not members of the Tribe. JA 141-43. The Pesickas paid $49,600 in cash for the land, or $155 per acre. *Id.* Edward and Mary Maciejewski, who are not members of the Tribe, purchased the remaining 1,905 acres from the Bank for $401,100

under a contract for deed on June 29, 1999. JA 148-57. The Maciejewskis paid approximately $210 per acre for the remaining pasture and farm land. The Long Company remained in possession of 960 acres. Simon Aff. at ¶ 14.

Together, the Maciejewskis and the Pesickas paid approximately $450,700 for the part of the property they acquired. According to the terms of the option to purchase, the Long Company's option to purchase for $468,000 — had it been exercised — would have been reduced with a net cost of $443,600 for the Long Company.

### F. The Tribal Courts

Because the Long Company continued in possession of 960 acres of the property following the expiration of the lease, the Bank sought to serve a Notice to Quit on the Long Company as a prerequisite to the action for forcible entry and detainer it filed in South Dakota state court. Off-reservation process servers cannot effectuate valid service on the Reservation, so the Bank sent the Notice to the Cheyenne River Sioux Tribal Court ("Tribal Court") on June 14, 1999, asking that the Tribal Court authorize service. JA 144-47. The Notice was then served by a tribal process server. JA 147.

In response to the Bank's Notice to Quit, Ronnie and Lila Long commenced the underlying Tribal Court action, seeking a temporary restraining order against the Bank. Simon Aff., Ex. 18. The Bank

responded, denying Tribal Court jurisdiction and opposing entry of injunctive relief. JA 181-82. The Tribal Court upheld jurisdiction and issued a preliminary injunction. Simon Aff., Ex. 19.

Ronnie and Lila Long then amended their Complaint, adding the Long Company as a Plaintiff. JA 158-79. They asserted several causes of action, including breach of contract and discrimination. *Id.* The Bank answered, again denying Tribal Court jurisdiction. JA 180-86. It then stated a Counterclaim alternatively, "in the event the Court finds that it does have jurisdiction," seeking eviction of the Long Company from the 960 acres of the farm real estate it continued to hold, and damages for holding over under the lease. *Id.*

A trial was held before a Tribal Court jury in Eagle Butte, South Dakota, on December 6 and December 11, 2002. In addition to the contract claim, the Longs asserted that the Bank discriminated against them by preventing the Long Company from exercising the option to purchase the leased property, and for charging a higher per-acre value than the subsequent nonmember purchasers. JA 171-72. The discrimination claim was submitted to the jury as a claim by Ronnie and Lila Long, not the Long Company. Simon Aff., Ex. 25 at 130.

The jury returned a general verdict, encompassing all claims of the Longs and the Long Company against the Bank, for $750,000, and indicated that interest should also be awarded. JA 192; *see also* JA

194-96. The jury found the Bank had discriminated against Ronnie Long and Lila Long. JA 191.

On post-trial motions, the Tribal Court upheld jurisdiction over the Bank, ruled that federal law supported the discrimination claim, added pre-judgment interest to the judgment, and gave the Long Company an option to purchase the 960 acres it possessed by offset against the judgment. A-69-71, 82-83.

The Bank appealed the judgment to the Cheyenne River Sioux Tribal Court of Appeals ("Tribal Court of Appeals"). The Tribe participated as amicus curiae on appeal. In an opinion dated November 22, 2004, the Tribal Court of Appeals affirmed the Tribal Court ruling, agreeing with the Tribe that the discrimination claim was based on tribal common law, arising out of tribal tradition and custom. A-45, 54. Neither party had previously argued that the discrimination claim was based upon tribal tort law. Simon Aff., Ex. 28. The Tribe does not have a codified discrimination statute. A-54.

## G. The Federal Courts

The Bank then commenced a declaratory-judgment action in the U.S. District Court, District of South Dakota, Central Division. Complaint (D.S.D. Jan. 7, 2005) (Dkt. No. 1). The Bank moved for summary judgment based upon the Tribal Court's lack of jurisdiction, as well as the violation of its due-process rights. Pl's Mot. for Summ. J. (D.S.D. Dec. 1, 2005)

(Dkt. No. 30). The Longs made a cross-motion for summary judgment. Defs' Mot. for Summ. J. (D.S.D. Dec. 1, 2005) (Dkt. No. 36). The District Court ruled on the parties' cross-motions for summary judgment in an order and memorandum dated July 17, 2006. A-24. It granted the Longs' motion and denied the Bank's motion, finding the Tribal Court had jurisdiction over the discrimination claim pursuant to the "consensual relationship" element of the first exception articulated in *Montana v. United States*, 450 U.S. 544 (1980), and ruling that due process was not violated. A-31-41.

The Bank appealed to United States Court of Appeals for the Eighth Circuit. There, the Bank asserted that the District Court erred in ruling that the Tribal Court had jurisdiction and that the Bank was afforded due process. Appellant Br. (8th Cir. Oct. 23, 2006) (Dkt. No. 16).

Specifically, the Bank challenged the District Court's determination of jurisdiction based on consent and a voluntary consensual relationship with tribal members. It argued that the Tribal Court did not have jurisdiction over the federal claim, and that the after-the-fact assertion of tribal discrimination-law resulted in a violation of the Bank's due-process rights. *Id.*

In an opinion dated, June 26, 2007, the Circuit Court affirmed the ruling of the District Court. It found that the Bank's due-process rights had not been violated, and that the Tribal Court's exercise of

jurisdiction over the Bank fell within the inherent authority of the Tribe under the first *Montana* exception. A-9-18. According to the Circuit Court, the Bank formed a consensual relationship with tribal members. Thus, the tribal tort law the Longs invoked was an "other means" by which a tribe may regulate nonmember conduct. *Id.*

The Bank petitioned this Court for a writ of certiorari, which this Court granted on January 4, 2008. In its petition, the Bank explicitly declined to seek review of two arguments made below — that tribal courts lack jurisdiction to adjudicate claims based on federal law, and that the Tribal Court's judgment should be denied comity because the Bank was denied due process — to present its main argument without extraneous distractions. Petition for Writ of Certiorari at 1, No. 07-411 (Sept. 21, 2007).

## SUMMARY OF THE ARGUMENT

The Tribal Court lacked jurisdiction to adjudicate the Longs' common-law tort claim as an "other means" of regulating the Bank's nonmember conduct arising out of land it owned within the Reservation's boundaries and leased to a member-owned, South Dakota corporation. The underlying contracts concern land the Bank owned on the Reservation, which it leased to a South Dakota corporation, the Long Company. The Longs, who are members of the Tribe,

had a majority shareholder interest in the Long Company.

This lending relationship cannot support tribal adjudicatory jurisdiction over members' tort claims. The Tribe was generally divested of authority over nonmembers because of its dependent sovereign status. The general rule established in *Montana*, 450 U.S. 544, controls. The exceptions do not overcome the presumption against retention of inherent tribal regulatory authority over nonmembers.

Once the power to exclude nonmembers from particular reservation lands has been surrendered by the tribe or terminated by Congress, inherent tribal regulatory power over nonmembers ordinarily is lost. *Bourland*, 508 U.S. at 679. Where there is no regulatory power, there can be no tribal adjudicatory power over nonmembers. This is a consequence of tribes' dependent status in our federal system. The Bank's ownership of the land at issue precludes assertion of regulatory, and consequently adjudicatory, authority by the Tribe.

Even if the Bank's ownership of the land is not dispositive, the Tribe lacked retained, inherent tribal authority to regulate the Bank or adjudicate the Longs' or their company's dispute with the Bank. The exceptions this Court recognized in *Montana* provided for exercise of retained, inherent adjudicatory authority only where a nonmember's conduct threatens the very survival of a tribe. This case does not implicate that exception. *Strate v. A-1 Contractors*, 520 U.S.

438 (1997). Nor does it implicate the *Montana* exception that contemplated tribal ability to regulate — through licensing, taxation, or other presumably similar means — nonmember conduct arising out of a consensual relationship with a tribe or its members.

The Bank's contracts were made with the Longs' South Dakota corporation. That activity was not susceptible to regulation by the Tribe. Thus, without the power to regulate, there could be no power to adjudicate. *Nevada v. Hicks*, 533 U.S. 353 (2001). But more importantly, the Tribe lacked retained, inherent authority to regulate the Bank's activity by applying tribal common law to adjudicate the Longs' claims. It does not follow from the Bank's contracts with the Long Company that it consented to the Tribe's civil adjudication of the tort claim, or any other claim. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001). A broad range of policy concerns militate against recognition of tribal-court jurisdiction over nonmembers. The Tribe's assertion of adjudicatory authority over the Bank is inconsistent with its diminished status as a dependent sovereign.

## ARGUMENT

### I. THE DEPENDENT SOVEREIGN STATUS OF INDIAN TRIBES CARRIES WITH IT A GENERAL DIVESTITURE OF AUTHORITY OVER NONMEMBERS.

The Tribe may maintain internal sovereignty with respect to its members, but lacks broad authority over

nonmembers such as the Bank. This is particularly so when the Tribe would be extending its authority over non-Indian land — even when that land is within the boundaries of the Reservation. This is a consequence of history.

Indian tribes, while possessing certain incidents of preexisting sovereignty, are not comparable to state or local governments. They instead possess unique legal characteristics identified early in this Nation's jurisprudence. They are — at most — "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Their relationship with the United States is "marked by peculiar and cardinal distinctions which exist nowhere else." *Id.* at 16. The inherent political and territorial sovereignty tribes originally possessed has been diminished, and in some respects eliminated, by the United States throughout its history. *See Worcester v. Georgia*, 31 U.S. 515 (1832), *superseded and abrogated on other grounds*.

One of the unique legal characteristics of Indian tribes is the extent to which the United States has divested tribes of authority with respect to nonmembers who live on, conduct business within, or pass through reservations. This Court's opinions have helped define the scope of that divestiture, based in part on this Court's consistent view of the nature of tribal sovereignty. Two basic threads of this Court's Indian-law jurisprudence explain why.

The first thread is that Indian tribes possess powers of internal self-government that are neither based in, nor constrained by, the Constitution. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896). Indian tribes' inherent powers of self-government are of a kind "unknown to any other sovereignty in the Nation," *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (Stevens, J., concurring in part and dissenting in part), a fact that reflects they are not party to the federal Union. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1990). Thus, where extant, Indian tribes' inherent powers of self-government allow them to govern in ways that would "be intolerable in a non-Indian community." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982) (Stevens, J., dissenting); *Santa Clara Pueblo*, 436 U.S. at 55-56.

The second thread recognizes that Indian tribes are no longer independent nations. They have been incorporated into our Nation's social and political fabric. Of necessity, however, this incorporation involved the divestiture of Indian tribes' preexisting sovereign powers to determine independently their relations with persons who are not part of their self-governing political community. If, as Chief Justice Marshall observed in *Worcester*, 31 U.S. at 560-61, under the "settled doctrine of the law of nations . . . a weaker power does not surrender its independence — its right to self government, by associating with a stronger, and taking its protection," the correlative

principle is also true: that such retained self-government rights empower the weaker power to do no more than to "maintain [its] own laws and usages and customs over [its] own race, [and to] regulate [its] own private rights and affairs according to [its] own municipal jurisprudence." Joseph Story, *Commentaries on the Conflict of Laws* § 2a (1865). This correlative principle is reflected in Justice Johnson's oft-quoted statement from his concurrence in *Fletcher v. Peck*, 10 U.S. 87, 147 (1810), "[a]ll the restrictions upon the right of soil in the Indians [ ] amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves."

This Court's modern decisions have carried forward this view of limited inherent, retained tribal sovereignty. As explained in *Bourland*:

> Although Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, . . . the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and cannot survive without express congressional delegation."

*Bourland*, 508 U.S. at 694-95 (citing *Montana*, 450 U.S. at 564). Indian tribes' retained inherent sovereign powers are thus grounded, either in notions of

self-government (*see, e.g.*, *Duro v. Reina*, 495 U.S. 676, 684-86 (1990), *superseded by statute on other grounds*), or federal delegation (*see, e.g.*, *United States v. Mazurie*, 419 U.S. 544, 556-58 (1975)).

Indian tribes do retain some indicia of sovereignty. *United States v. Wheeler*, 435 U.S. 313 (1978). But through their original incorporation into the United States, as well as through specific treaties and statutes, they have lost many of the attributes of sovereignty, particularly as to the relations between a tribe and nonmembers of the tribe. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-46 (1980), *superseded by statute as to inherent power of tribes to exercise criminal jurisdictional over all Indians*. As this Court observed in *Montana*:

> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.

*Montana*, 450 U.S. at 564 (internal citations omitted).

In the present case, the Longs brought suit against the Bank in Tribal Court on the Cheyenne River Sioux Reservation in South Dakota.[1] The

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[1] This Court has addressed the history of the Sioux Tribe and the Cheyenne River Sioux Reservation in at least three previous cases: *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (involving review of an Indian Claims Commission decision

(Continued on following page)

Reservation was originally a part of the Great Sioux Reservation established by the Fort Laramie Treaty of 1868, which comprised virtually all of what is now South Dakota west of the Missouri River, as well as part of what is now south-western North Dakota. 15 Stat. 635; *see also Bourland*, 508 U.S. at 682.

Then, in the Indian General Allotment Act of 1887, Congress provided non-Indians with fee title to some of the unallotted and surplus lands on the Reservation. 24 Stat. 388. And in the Act of Mar. 2, 1889, Congress greatly reduced the Great Sioux Reservation, replacing it with smaller reservations. 25 Stat. 888. The Cheyenne River Sioux Reservation — located in north-central South Dakota — was the largest of these smaller reservations, with boundaries established by the Act that encompassed 2.8 million acres. *Id.* With the Act of May 29, 1908, Congress further authorized the Secretary of the Interior to open 1.6 million acres of the Reservation to homesteading and settlement by non-Indians. 35 Stat. 460. As a result of these (and subsequent) actions by Congress, some of the land within the Reservation boundaries is owned by the Tribe and its members; some is owned by nonmembers.

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regarding an 1877 act that effected a taking of the Black Hills without compensation); *Bourland*, 508 U.S. 679 (involving the Tribe's inability to regulate nonmember hunting on Reservation land taken by the United States for construction of a dam and reservoir project); and *Solem*, 465 U.S. 463 (involving interpretation of the Act of May 29, 1908, and its impact on state court criminal jurisdiction over members).

The result is extensive and pervasive interaction between land owned by the Tribe or its members — over which the Tribe may exercise certain retained inherent sovereignty — and land owned by nonmembers. Nonmembers' ownership of land on an Indian reservation operates to divest the tribe of any sovereignty over that land. Such sovereignty is held by States or the federal government.

The Longs' tribal common-law discrimination claim decided in Tribal Court against the Bank necessarily falls outside the scope of the limited sovereignty retained by the Tribe. Specifically, alleged discriminatory acts by a nonmember owning non-Indian fee land against member-majority owners of a South Dakota corporation that entered into a lease agreement with the nonmember, do not infringe upon the Tribe's ability to govern itself or to control its internal relations. By definition, nonmembers are excluded from participation in such self-government, and Congress has not delegated to tribes civil-adjudicatory jurisdiction over nonmember, non-Indians.

## II. TRIBAL-COURT CIVIL JURISDICTION DOES NOT EXTEND TO THE ACTIVITIES OF NONMEMBERS OWNING FEE LAND ON A RESERVATION.

This case should be resolved by application of the general presumption against tribal authority over a nonmember land owner such as the Bank. The Tribe

retains no inherent authority to govern the activities of a nonmember where, for whatever reason, the land at issue has passed into non-Indian ownership. The fact that the Bank owned the land on the Reservation that it leased to the Long Company should completely preclude tribal authority over the Bank in this case.

In *Montana*, this Court established narrow exceptions to the general rule that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. However, this Court need not determine whether either exception applies, because the land at issue is non-Indian-owned fee land. Although as recognized in *Hicks*, 533 U.S. at 360, land ownership is not a dispositive factor, tribal power is at its nadir when nonmember land ownership is involved. With one limited exception (*Brendale*, 492 U.S. 408), this Court has never recognized tribal civil-regulatory jurisdiction over the conduct of a nonmember owning non-Indian fee land on a reservation, and it has never before recognized tribal-court civil-adjudicatory jurisdiction over a nonmember defendant in over 200 years of jurisprudence.

To be sure, "tribal jurisdiction over nonmembers on non-Indian fee land has been the subject of extensive litigation." F. Cohen, *Handbook of Federal Indian Law*, 600 (2005). But this Court has made clear that treaty provisions securing tribal authority over reservation lands "must be read in light of the subsequent alienation of those lands." Cohen, *supra*, at 600-01 (internal citations omitted).

In *Nat'l Farmers Union*, 471 U.S. 845, this Court first considered the potential for tribal civil-adjudicatory jurisdiction over a non-consenting nonmember. Although it was ultimately resolved through application of the exhaustion-of-tribal-remedies doctrine, this Court characterized the civil-adjudicatory question as concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians. That, in turn, must be determined by an examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. *Id.* at 855-56.

This Court has defined the scope of rights enjoyed by Indian tribes. In fact, in *Bourland*, this Court determined that the Cheyenne River Sioux Tribe had given up — by operation of the General Allotment Act of 1887, the Act of 1889, and the Act of 1908 — its right to regulate nonmembers on non-Indian-owned land inside the Reservation. *Bourland*, 508 U.S. at 689. This is because when a tribe (or Congress) conveys ownership of tribal lands to non-Indians, the tribe loses the right of absolute and exclusive use and occupation of these lands. *Id.* "The abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others." *Id.* Stated differently, "the power to regulate is of diminished practical use if it does not include the power to exclude: Regulatory authority goes hand in

hand with the power to exclude." *Id.* at 691, n.11 (citations omitted).

*Bourland* controls here. There is no material distinction between the abrogation of Cheyenne River Sioux inherent tribal sovereignty in *Bourland*, and that given up by the Tribe in this case. When Congress opened up the tribal trust lands and other reservation land for the Oahe Dam and Reservoir Project in *Bourland* through the Flood Control and Cheyenne River Acts, it eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory-jurisdiction formerly enjoyed by the Tribe. *Bourland*, 508 U.S. at 689. The fact that nonmember Kenneth Long owned, and his estate subsequently deeded, the land at issue to the nonmember Bank, shows that a similar divestiture of tribal sovereignty had occurred here. "[R]egardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." *Bourland*, 508 U.S. at 692.

This reasoning is straightforward, and flows from the theory of "implied divestiture" articulated by this Court. Due to their diminished status as sovereigns, tribes have necessarily lost any "right of governing every person within their limits except themselves." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 205 (1978) (holding Indian tribes lack criminal jurisdiction over nonmembers). In particular, "the areas in

which such implicit divesture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe. . . .*" *Montana*, 450 U.S. at 564 (emphasis in original), quoting *Wheeler*, 435 U.S. at 326. And this Court has consistently "rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude.'" *Hicks*, 533 U.S. at 359 (citations omitted); *see also Montana*, 450 U.S. at 559 (noting that it defies common sense to suppose Congress would intend non-Indians purchasing allotted lands would become subject to tribal jurisdiction when the purpose of allotment was elimination of tribal government; relevant consideration is effect of land alienation on treaty rights tied to use and occupation of reservation).

Significantly, since *Montana* was decided, "the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Hicks*, 533 U.S. at 360 (comparing *Merrion*, 455 U.S. at 137, 142 (tribe has taxing authority over tribal lands leased by nonmembers), with *Atkinson*, 532 U.S. at 659 (tribe has no taxing authority over nonmembers' activities on land held by nonmembers in fee)); *but see Brendale*, 492 U.S. at 443-44, 458-59 (opinions of Stevens, J. and Blackmun, J.) (tribe can impose zoning regulation on that 3.1% of land within reservation that was not

owned by the tribe). "[T]he existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." *Hicks*, 533 U.S. at 360. Excepting, however, the zoning issue in *Brendale*, the absence of tribal ownership has precluded tribal jurisdiction over nonmembers on non-Indian-owned land on a reservation.

By noting in *Hicks* that land ownership was "only one factor to consider" in determining whether tribal jurisdiction was proper over nonmembers, this Court did not weaken the general concept that nonmember ownership is usually preclusive. *Id.* Rather, the Court in *Hicks* extended its jurisdictional analysis to Indian-owned land on the tribal reservation. For the purpose of the present analysis, however, the Court did recognize that nonmember land ownership can "be a dispositive factor." *Id.* And as to that frequently "dispositive factor," Justice Souter's concurrence adds that it is the membership status of the party, not merely the status of the land, that is the primary jurisdictional fact. *Hicks*, 533 U.S. at 382.

There is no dispute that the Bank held fee-simple title to the land at issue. Under *Montana* and its progeny, this fact alone precludes tribal-court adjudication of the Longs' discrimination claim against the Bank. For all practical purposes, whatever interest or right to regulate the land the Tribe initially had was lost when the Tribe lost ownership of the land. *See Bourland*, 508 U.S. at 688-89. The fact the Bank entered into a lease with a member-owned South Dakota corporation is inconsequential.

Neither *Montana* exception is applicable, as the Tribe could not exercise rights incidental to ownership over the non-Indian fee land at issue, and, therefore, could not regulate its use.

## III. TRIBAL COURTS MAY NOT ADJUDICATE TORT CLAIMS AGAINST NONMEMBER DEFENDANTS; THEIR INHERENT POWERS DO NOT EXTEND TO THE ACTIVITIES OF NONMEMBERS.

Even assuming, for the sake of argument, that the non-Indian-owned status of the land does not, by itself, preclude tribal adjudicative jurisdiction over the nonmember Bank, the Circuit Court's holding — that a tribal civil court may hear civil tort claims involving a nonmember as an "other means" of regulating its conduct — must be reversed. The Circuit Court's decision tears down the wall separating tribal civil-regulatory and adjudicatory jurisdiction erected by this Court in *Montana*.[2] As a result, the Eighth Circuit would elevate tribal courts to the status of courts of general jurisdiction, contrary to the teaching of *Hicks*. That is, they would have general

[2] The federal district court judge who presided over this case, Judge Kornmann, recently observed: "As I read the [United States Court of Appeals for the Eighth Circuit's] appellate opinion, I was struck by the fact that such opinion would clearly and substantially broaden the jurisdiction of tribal courts in the Eighth Circuit. . . . this would be a significant expansion of tribal court jurisdiction in civil cases." *Farmers Union Oil Co. v. Guggolz*, No. CIV 07-1004, 2008 WL 216321, *6 (D.S.D. 2008).

civil-adjudicative jurisdiction to hear tort and contract claims brought against nonmember defendants on reservations — an issue this Court has never before decided, and which it should now decide in the negative.

As this Court is well aware, *Montana* recognized two exceptions from the general principle that tribes lack civil jurisdiction over nonmembers. First, "[a] tribe may *regulate*, through *taxation*, *licensing*, or *other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (emphasis added). Second, "[a] tribe may also retain inherent power to exercise *civil authority* over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (emphasis added).

*Montana* immediately involved regulatory authority under the first exception (the ability to require nonmember hunters to purchase licenses to hunt on non-Indian land within the boundaries of the reservation). *Id.* at 564-67. But it used the concept of inherent sovereignty, through the main rule and, in particular, its second exception, to define the extent of tribes' retained power to exercise forms of civil regulatory and adjudicatory jurisdiction over non-Indians. The first exception is, in contrast to the second, wholly transactional in nature; *i.e.*, tribal

regulatory-authority over the nonmember is truly not "inherent," but agreed to by a nonmember as the price of doing business with a tribal member.

Following *Montana*, this Court clarified the intended narrowness of both in *Strate*, 520 U.S. at 446. As to the first exception, the Court reiterated the type of consensual activities that it had in mind — concluding that the alleged tort did not present a qualifying consensual relationship. *Id.* at 456-57. As to the second exception, the Court reiterated the type of tribal interests it envisioned — concluding that the optional opening of tribal court for the claim at issue was not necessary to protect tribal self-government or control internal regulations against impermissible state intrusion. *Id.* at 457-59. The Court also rejected the argument that *Montana*'s general rule against tribal authority over nonmembers applied only to regulatory, as opposed to adjudicatory, authority — holding that a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. *Id.* at 453. *See also* Cohen, *supra*, at 232.

The split of tribal civil-jurisdiction into regulatory authority and adjudicatory authority set forth in *Montana* should be maintained. "*Legislative jurisdiction* concerns a government's general power to regulate or tax persons or property, while *adjudicative jurisdiction* concerns the power of a court to decide a case or to impose an order." Cohen, *supra*, at 597 (emphasis in original). "[L]egislative jurisdiction" and "adjudicative jurisdiction" must be analyzed separately because they involve different concerns. *See*

Cohen, *supra*, at 598. ("The Supreme Court has often suggested that adjudicative and legislative jurisdiction are separate inquiries for tribal courts, as they are for state and federal courts.")

### A. *Montana*'s Second, "Adjudicatory" Exception Is Not Applicable Because Self-Government and Internal Relations Are Not Implicated.

Simply stated, this is not a second *Montana* exception case, because the alleged discriminatory conduct did not "threaten[ ] or ha[ve] some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Strate*, 520 U.S. at 441, 446, 457-58 (holding nonmember defendant's contractual agreement with tribe for on-reservation work insufficient to support jurisdiction because the civil action sounded in tort, and though careless driving threatens the health and safety of tribal members, availability of state civil litigation is sufficient to deter and compensate for dangerous driving); *see also Atkinson*, 532 U.S. at 657 (rejecting application of tribe's hotel occupancy tax to nonmembers under *Montana*'s second exception, because hotel operation within reservation did not threaten or directly affect the political integrity, the economic security, or the health or welfare of the tribe).

As this Court noted in *Strate*, when "[r]ead in isolation, the *Montana* rule's second exception can be misperceived." *Strate*, 520 U.S. at 459. Its purpose is

to protect against infringement of the tribes' retained, inherent authority — such as to punish tribal offenders, to determine tribal membership, to regulate members' domestic relations, and to proscribe rules of inheritance for members. *Id.* The second *Montana* exception's applicability is limited to situations where it is needed to preserve the right of reservation Indians to make their own laws and be ruled by them.

This case principally involved two private actors — a nonmember Bank and a South Dakota corporation. "[I]f *Montana*'s second exception require[d] no more, the exception would severely shrink the rule [that tribes lack civil jurisdiction over nonmembers on non-Indian-owned land]." *Strate*, 550 U.S. at 458. To its credit, the Circuit Court properly concluded this was not a second *Montana* exception case.

The problem is that the Circuit Court shoehorned into the first *Montana* "regulatory" exception, tribal "adjudicative jurisdiction" over nonmembers, notwithstanding the fact that "a tribe's inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations . . . [and] [a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, 520 U.S. at 453, 459. Tribes' inherent, retained authority generally does not extend to nonmembers.

The Circuit Court ignored controlling precedent of this Court. The circumstances that would allow tribal civil-adjudication under the second *Montana*

exception are not present here: "[s]elf-government and internal relations are not directly at issue. . . . since the issue is whether the Tribes' law will apply, not to their own members, but to a narrow category of outsiders." *Hicks*, 533 U.S. at 371.

### B. *Montana*'s First "Regulatory" Exception Is Also Not Applicable Because There Is No Consent to Regulation.

As a threshold issue, the first *Montana* "regulatory" exception requires the existence of a consensual relationship between the Tribe, or its members, and the nonmember Bank. The exception provides that "[a] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Because no such relationship existed, the Circuit Court should not have applied it.

Here, the Circuit Court supposed the member-owned Long Company to be a tribal member for *Montana* analysis purposes, "[b]ecause the bank not only transacted with a corporation of conspicuous tribal character, but also formed concrete commercial relationships with the Indian owners of that corporation." A-12. Yet the December 1996 loan agreement, and the lease with option to purchase, were between the Bank and the Long Company, executed by the Longs only in their capacities as officers of the Long Company.

By ascribing tribal membership status to the Long Company, a member-owned South Dakota Corporation, for purposes of its analysis, the Circuit Court made an insupportable leap of logic. The Long Company's legal status is distinct from the Longs in their individual capacities as a matter of black-letter law. *See, e.g., Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (corporate owner is distinct from the corporation, which is a legally different entity with different rights and responsibilities due to its different legal status). Because the Long Company is neither an "Indian" nor a member of the Tribe, no consensual contractual relationship existed between a tribal member and nonmember. Rather, the contractual aspects of this case involve a relationship between two nonmembers – a situation falling outside the first *Montana* exception.

This Court's decision in *Atkinson*, 532 U.S. at 657, makes clear that a nonmember within a reservation on non-Indian fee land does not generally subject itself to tribal regulation. In *Atkinson*, this Court concluded that the Navajo Nation could not tax non-tribal-member guests of a hotel located on non-Indian fee land within the reservation. "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory,' but their dependent status generally precludes extension of tribal civil-authority beyond these limits." *Id.* at 659 (citation omitted).

The Court rejected the Navajo Nation's contention that a consensual relationship existed between

the guests and the Tribe based on the guests' acceptance of benefits from services potentially rendered by the Tribe. *Id.* at 654. The Court found that receipt of such services did not satisfy the requisite relationship. "If it did, the exception would swallow the rule: All non-Indian fee lands within a reservation benefit, to some extent, from the 'advantages of a civilized society' offered by the Indian tribe . . . we think the generalized availability of tribal services patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land." *Id.* at 655.

"A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another — it is not 'in for a penny, in for a Pound.'" *Atkinson*, 532 U.S. at 656 (citations omitted). In practical effect, the first *Montana* exception is limited to regulation of commercial relationships on Indian-owned, tribal reservation lands where nonmembers voluntarily accept existing tribal regulation, or its possibility. *See, e.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (holding that tribes retained power to impose cigarette taxes on nonmember purchasers with respect to on-reservation sales).

As in *Atkinson*, there is no merit to the idea that by leasing non-Indian land on a reservation to a member-owned South Dakota Corporation, the Bank availed itself of the advantages of doing business with a member, thereby subjecting itself to the regulatory jurisdiction of the Tribe. And this in no way bound the nonmember Bank to adjudication of

claims in Tribal Court. The asserted basis for tribal regulatory-authority here is even more tenuous than in *Atkinson*.

The Bank owned the land, and the only agreements at issue are between the Bank and a member-owned South Dakota corporation, a business entity not organized under Indian law, but rather the law of the State of South Dakota. If anything, it was the Long Company that took advantage of state law to shield its members from personal liability. Accordingly, any claims arising from the Bank's contracts with the Long Company should be governed by South Dakota law.

Even assuming, for the sake of argument, the Long Company is an "Indian," thereby allowing the first *Montana* exception analysis to proceed, the parties simply did not enter into a consensual relationship that contemplated tribal adjudication of the discrimination tort at issue. A tort is a wrongful act by one party, not including a breach of contract or trust, resulting in an injury to another which entitles the other party to compensation. Black's Law Dictionary 1036 (6th ed. 1991). As discussed more fully below, the consensual-relationship test of the first *Montana* exception simply cannot be read to provide adjudication of a tort claim as an "other means" of regulating nonmember conduct, where the tort presupposes existence of an injury resulting from something other than a breach of contract.

Furthermore, because the "Tribe [ ] lost the right of absolute use and occupation of lands so conveyed, the Tribe no longer had the incidental power to regulate the use of the lands by non-Indians." *Bourland*, 508 U.S. at 688. Because the Tribal Court could not regulate the activities of the nonmember Bank under the first *Montana* exception, it necessarily follows that the Tribal Court could not adjudicate the claims against the Bank as an "other means" of regulation.

### C. Tribal-Court Adjudication of a Tort Claim Against a Nonmember Is Not an "Other Means" of Regulating Its Conduct Under the First *Montana* Exception.

*Montana*'s first exception has nothing to do with "adjudication." It provides that "[a] tribe may *regulate*, through *taxation*, *licensing*, or *other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Hicks*, 533 U.S. at 371 (emphasis added), quoting *Montana*, 450 U.S. at 565. This case begs the question whether "adjudication" by a tribal court can be an "other means" for the tribe to regulate nonmembers that enter into consensual relationships with the Tribe or its members.

The Circuit Court's interpretation of "tribal court adjudication" as an "other means" of "regulating" nonmember conduct turns the first *Montana* exception on its head. This Court has not, and should not,

extend the first *Montana* exception in this way. Indeed, if this Court applies the statutory interpretation principles *noscitur a sociis* (it is known from its associates), and its corollary *ejusdem generis* (of the same kind), to the words "licensing," "taxing," and "other means" in the first *Montana* exception, the inexorable conclusion follows that "tribal adjudication" cannot be an "other means" of "regulating" nonmember conduct. *See Wash. State Dept. of Social & Health Servs. v. Keffeler*, 537 U.S. 371, 384 (2003) (defining and applying *ejusdem generis* and *noscitur a sociis*).

"Licensing" and "taxation" contemplate regulatory action by the tribe — a world apart from tribal-court adjudication of tort claims against nonmembers. Had this Court wanted to create adjudicative jurisdiction in instances not involving the welfare, political integrity, or economic security of a tribe, it could have easily done so by including such language in the first exception. But it did not. Rather, it created the second *Montana* exception, which contemplates adjudicatory jurisdiction over nonmembers in limited instances.

The "first exception" cases decided by this Court after *Montana confirm this proposition*: a tribe's ability to "regulate" the activities of nonmembers contemplates legislative enactments — such as licensing, taxing, and zoning — nothing else. *See Merrion*, 455 U.S. 130 (1982) (tribal tax over nonmembers permissible where oil and gas companies found to have entered into commercial relationship with tribe

for use of *member-owned* lands over which tribe retained right to exclude producers from affected lands); *Brendale*, 492 U.S. 408 (1989) (tribal zoning regulation over non-Indian land upheld under very limited circumstance); *Bourland*, 508 U.S. 679 (1993) (abrogation of tribes' absolute and undisturbed use and occupation of the involved tribal land under the statutes deprived tribe of power to license non-Indian use of the lands); *Strate*, 520 U.S. 438 (1997) (first *Montana* exception inapplicable for tribal court to hear claims arising from accident between two nonmembers on state highway in reservation, notwithstanding nonmember defendants' contractual relationship with the tribes, the tribal court plaintiff was not a party to that contract and the tribe was a "stranger to the accident"); and *Atkinson*, 532 U.S. 645 (2001) (tribe lacked authority to tax guests of hotel operated by nonmember on non-Indian land within reservation).

There is no comparable history of second *Montana* exception cases. Since its articulation in 1981, this Court has never applied the second *Montana* exception to find that a tribe had civil-adjudicatory jurisdiction over a nonmember defendant. It remains an unrealized possibility. The continuing absence of a second *Montana* exception case from this Court extending civil-adjudicatory jurisdiction, and the absence of a first *Montana* exception case from this Court construing civil-adjudicatory jurisdiction as an "other means" of regulation, together reinforce the point this Court made in *Hicks*: "[W]e have never held

that a tribal court had jurisdiction over a nonmember defendant." *Hicks*, 533 U.S. at 358, n.2.

The fact this Court chose to use the word "regulate" as opposed to "adjudicate" in the first *Montana* exception, is also noteworthy in and of itself. The Court's intended use of the word "regulate" no doubt parallels its prior usage in the Indian Commerce Clause of the United States Constitution, which provides: "Congress shall have the power . . . [t]o *regulate* Commerce with foreign Nations, and among the several States, *and with the Indian Tribes*." U.S. Const. Art. I, § 8, cl. 1 (emphasis added). Historically, the "commerce clause is the most often cited basis for modern legislation regarding Indian tribes, from legislation protecting tribal cultural resources, to legislation regulating gaming in Indian country." Cohen, *supra*, at 397. Naturally, regulation is effectuated through legislative enactment, not adjudication of tribal tort claims in tribal court.

In *Strate*, this Court concluded that tribal adjudicatory jurisdiction over non-consenting, nonmember defendants could not exceed the reach of inherent tribal regulatory authority. *Strate*, 520 U.S. at 453. In other words, tribal-court jurisdiction would be absent if the tribe could not regulate the involved activity pursuant to its inherent authority. This Court, therefore, found that the tribal court lacked the ability to adjudicate a tort claim against a nonmember arising out of an accident that occurred on a state highway, on a federal right-of-way through reservation land, even though the nonmember had a contract with the

tribe to perform work on the reservation. Moreover, the tortious nature of the claim precluded consent. *See Strate*, 520 U.S. at 456-57.

This Court followed a similar approach in *Hicks* — analyzing the availability of civil-adjudicatory jurisdiction by first considering whether civil-regulatory jurisdiction existed. Because adjudicatory jurisdiction can be no larger than regulatory jurisdiction, and because regulatory jurisdiction was absent, the Court did not resolve whether adjudicatory jurisdiction exists with respect to nonmember defendants. *Hicks*, 533 U.S. at 358, n.2. *Hicks*, however, casts doubt on whether there is a coterminous relationship between tribal adjudicatory and tribal regulatory authority. *Id.* at 358.

In sum, it is the second *Montana* exception that defines (and confines) the scope of tribal civil-adjudicatory authority over nonmembers — not the first. The Circuit Court's reading of the first *Montana* exception so as to permit tribal-court adjudication of a tort claim against the nonmember Bank as an "other means" of regulating its conduct, necessarily renders the second *Montana* exception useless — a result antithetical to its creation.

## IV. PUBLIC POLICY MANDATES AGAINST FORCING NON-INDIANS TO DEFEND THEMSELVES IN TRIBAL COURT.

Tribal civil-adjudicatory jurisdiction over nonmembers is an ill-defined proposition. Unfortunately,

the Circuit Court's decision, without significant considered analysis, creates a form of tribal authority this Court has never before recognized: tribal-court civil-adjudicatory jurisdiction over nonmember defendants. This Court has suggested that nonmember defendants may be subject to a tribe's adjudicatory authority in the proper circumstances. But it has never so held.

Whenever the question has arisen regarding a specific nonmember defendant, tribal jurisdiction has either been found absent, or the question was not decided. By holding that tribal courts can adjudicate tort claims against nonmembers as an "other means" of regulating their conduct, the Circuit Court has summarily answered this question, determining for itself that tribal regulatory and adjudicatory authority are coextensive. "Surely [this issue] deserves more considered analysis." *Hicks*, 533 U.S. at 374.

Indian tribes and their members have taken steps over the past several decades to shape their future and develop internal systems of government and economies. But the fact remains that, at present, tribal courts remain very different from state and federal courts in the United States, and the concerns articulated by Justice Souter in his concurrence in *Hicks* as to the appropriateness of tribal-court civil jurisdiction over nonmembers still remain.

Until approximately 25 years ago, "tribal courts were the least developed branch of tribal government." Cohen, *supra*, at 265. Tribes have their own

traditional, though mostly informal and unwritten, governmental and legal systems. *Id.* at 265-67. Tribal justice systems, however, have been underfunded for decades. U.S. Comm'n of Civil Rights, A Quiet Crisis: Federal Funding and Unmet Need in Indian Country, 79 (2003). And the lack of adequate funding has impaired their operation. 1993 Tribal Justice Support Act, 25 U.S.C. § 3601 (1993).

Justice Souter pointed out additional concerns. The Bill of Rights and the Fourteenth Amendment do not apply to Indian Tribes. *Hicks*, 533 U.S. at 383 (Souter, J., concurring). The handful of analogous safeguards enforceable in tribal court under the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, "are not identical," *Oliphant*, 435 U.S. at 194. The presumption against tribal-court civil jurisdiction therefore squares with one of the principal policy considerations underlying *Oliphant*: an overriding concern that nonmember citizens be "protected . . . from unwarranted intrusions on their personal liberty." *Hicks*, 533 U.S. at 384, quoting *Oliphant*, 435 U.S. at 210.

There are also significant differences between tribal courts and other American courts in their structure, in the substantive law they apply, and in the independence of their judges. *Hicks*, 533 U.S. at 384. Most significantly:

> Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and

> norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." [citation] The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law," [citation], which would be unusually difficult for an outsider to sort out.

*Hicks*, 533 U.S. at 384-85 (internal citations omitted).

These concerns show why "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequence given the special nature of Indian Tribunals." *Hicks*, 533 U.S. at 383 (internal citations and quotations omitted). Furthermore, nonmembers have no voice in tribal governance:

> [n]onmember[s] . . . living on the reservation are not in fact involved in tribal self-government . . . the Cheyenne River Sioux Tribe's constitution and bylaws do not allow nonmember[s] . . . to vote in tribal elections or hold office on the reservation.

*U.S. on behalf of Cheyenne River Sioux Tribe v. State of S.D.*, 105 F.3d 1552, 1559-60 (8th Cir. 1997).

Twin concerns also exist that a non-Indian defendant will not know the type of claim at issue, or, even more generally, the laws of the tribe. The Tribe, in its amicus brief to the Tribal Court of Appeals, acknowledged that "tribal law is 'still frequently unwritten, being based instead on values, mores, and

norms of a tribe and expressed in its customs, traditions, and practices.'" Simon Aff., Ex. 28 at 14. The Tribe also acknowledged that, in the absence of any written tribal law, "the tribal court is governed . . . by the traditional customs of the different Sioux bands residing on the reservation . . . Such traditional customs can be adduced by expert testimony." *Id.* at 15 (internal citation omitted).

In this case, there was a considerable question whether the Tribe's courts had authority to adjudicate a federal-law discrimination claim. Displeased with the result, the Tribe filed an amicus brief before the Tribal Court of Appeals, which then reversed the Tribal Court judge's decision, determining that the discrimination claim was a common-law tribal claim, not a federal claim, and that the Bank was properly a defendant before the Tribal Court. A-52-55.

The legal uncertainty of what exactly tribal law is was readily apparent in this case. Even counsel for the parties in the underlying case believed the discrimination claim at issue to be a federal-law claim. It was the Tribe, in its amicus brief, that first suggested the discrimination claim arose from tribal law and that such a claim was based, not on the tribal codes, but on "Lakota tradition and custom," and "Lakota principles of equity and fairness." Simon Aff., Ex. 28 at 16. The Tribal Court of Appeals then determined the discrimination claim sounded in tribal tort law. A-52-55. Citing no prior tribal law precedent, the Tribal Court of Appeals recognized a tribal discrimination claim in its opinion, which the

absence of prior precedent suggests it had never before recognized.

Practically speaking, there are no compelling reasons requiring a nonmember defendant to defend itself in tribal court against a tort claim brought by a tribal member. Lawsuits like this one, that only involve private actors, one of whom is a nonmember defendant owning non-fee land on the reservation, do not belong in tribal court.

It is true that the indicia of sovereignty retained by the tribes allows them to "punish tribal offenders . . . to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana*, 450 U.S. at 564. But this Court has determined that tribes lack civil jurisdiction with respect to claims brought against nonmembers because "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* This is because:

> The areas in which such implicit divestiture of [tribal] sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . . [] [which] rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*.

*Montana*, 450 U.S. at 564 (emphasis in original) (internal citations omitted).

As noted by this Court in *Strate*, "[o]pening the Tribal Court for [ ] [Respondent's] optional use is not necessary to protect tribal self-government." *Strate*, 520 U.S. at 459. The Long Company and its shareholders' concerns are no different in this case. Neither regulatory nor adjudicatory authority was needed here to preserve the right of Reservation Indians to make their own laws and be ruled by them. And requiring the Bank to defend itself in Tribal Court is not crucial to the political integrity, economic security, or health or welfare of the Tribe.

Here, the Tribe gave up its sovereignty and concomitant power to control nonmembers on non-Indian land within the Reservation long ago. Yet, even setting aside the facts of this case, the panoply of public policy concerns set forth above militates against recognition of tribal-court adjudicatory jurisdiction over a nonmember defendant, at least where the second *Montana* exception is not implicated.

## CONCLUSION

Plains Commerce Bank asks this Court to hold that the Tribal Court lacked jurisdiction to adjudicate the Longs' tribal common-law tort claim as an "other means" of regulating the Bank's nonmember conduct arising out of land it owned within the Reservation's boundaries and leased to a member-owned, South

Dakota corporation. Accordingly, this Court should reverse the District Court's grant of the Longs' cross-motion for summary judgment, reverse the District Court's denial of the Bank's motion for summary judgment as to the Tribal Court lacking jurisdiction, and remand this case to the United States Court of Appeals for the Eighth Circuit for further proceedings.

Respectfully submitted,

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# RESPONDENT'S BRIEF

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IN THE

# Supreme Court of the United States

PLAINS COMMERCE BANK,
*Petitioner*,

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG, AND LILA LONG,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## QUESTIONS PRESENTED

1. Whether petitioner has satisfied its burden to establish standing to challenge in federal court a claim in a tribal-court proceeding on which it prevailed.

2. Whether a tribal court may exercise subject-matter jurisdiction over a non-member that engages in a multi-year regular and continuous course of dealings with the tribe and members of the tribe on the reservation and engages in discriminatory conduct arising directly out of those commercial relations.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Long Family Land and Cattle Company, Inc. states that it was at all times at least 51% Indian-owned, that it is not a publicly held company, that it does not have any parent corporations, and that no publicly held company owns 10% or more of its stock.

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This case involves predatory lending by a bank on the Cheyenne River Sioux Reservation ("Reservation") in South Dakota. For more than seven years, petitioner engaged in commercial dealings with respondents Ronnie and Lila Long, members of the Cheyenne River Sioux Tribe ("Tribe" or "CRST"), controlling virtually every aspect of the financial management of their on-reservation business, respondent Long Family Land and Cattle Company, Inc. ("Long Company"). Two particular predatory practices underlie the claims in this lawsuit. First, petitioner switched a traditional bank-financed 20-year contract-for-deed with respondents for a lease-with-option-to-purchase that required the entire principal to be paid in two years — terms far more onerous than petitioner offered for the same land to non-members of the Tribe. Second, to ensure that respondents could not make the necessary balloon payment within two years, petitioner breached a contract to pay an operating loan for necessary winter cattle feed, even though the Bureau of Indian Affairs ("BIA") and the personal collateral demanded by petitioner guaranteed the loan.

Petitioner mischaracterizes the facts, this Court's cases, and what is truly at stake in this litigation — all to deny tribal members access to tribal courts to adjudicate and resolve similar wrongs committed by lending institutions that voluntarily and knowingly do business in Indian Country.

Before reaching the merits, this Court must first determine whether petitioner has standing to press its challenge. A close review of the record reveals that petitioner prevailed on the discrimination claim — the only claim it continues to challenge. Notwithstanding the jury's finding that petitioner discrimi-

nated against respondents, in its post-trial supplemental judgment, the Cheyenne River Sioux Tribal Court ("Tribal Court" or "CRSTC") reconciled that jury finding with another jury finding *favoring* petitioner by denying respondents the relief requested on their discrimination claim. Because no relief was awarded for discrimination, petitioner cannot meet its burden of establishing injury sufficient for a case or controversy under Article III. Alternatively, because the Tribal Court's judgment rests on an independent breach-of-contract ground that petitioner does not challenge here, the case should be affirmed on that basis or dismissed as improvidently granted.

On the merits, this case represents a straightforward application of *Montana v. United States*, 450 U.S. 544 (1981), on a record petitioner assiduously ignores. This Court has consistently stated that a tribal court may exercise subject-matter jurisdiction over a non-member's conduct on its reservation: (1) when a non-member engages in consensual business dealings with the tribe or tribal members; and (2) when the non-member's conduct threatens the political integrity or economic security of the tribe. The discrimination tort here arises out of long-standing, consensual financial dealings, thus readily satisfying *Montana*. Moreover, petitioner's specific litigation actions evidence its consent to tribal-court jurisdiction, as both federal courts below correctly found. Petitioner initiated this proceeding in Tribal Court, conceded there that the Tribal Court had jurisdiction over the case, and elected not to prosecute its simultaneously pending state-court eviction action against respondents. This case is far afield from an unwilling and unwitting non-member haled into tribal court.

## STATEMENT

1. This Court is familiar with the history between the United States and the Sioux Nation. *See, e.g., United States v. Sioux Nation*, 448 U.S. 371, 374 (1980). As with many other Indian tribes, federal Indian policy sought to transform the Sioux from itinerant hunters into reservation-confined farmers and ranchers.[1] As relevant here, the 1889 Agreement took 9 million acres of the Great Sioux Reservation out of Indian ownership as "surplus lands" and established the Pine Ridge, Rosebud, Standing Rock, Lower Brule, Crow Creek, and Cheyenne River Sioux Reservations. To encourage the Sioux to become farmers and ranchers, the 1889 Agreement provided for the allotment of tribal land "advantageous for agricultural or grazing purposes" to individual Indians and authorized the distribution of "such and so many American breeding cows of good quality . . . as in his judgment can be . . . cared for and preserved, with their increase, by said Indians." §§ 8, 17, 25 Stat. 890, 894-95.

In 1908, Congress authorized the Secretary to open 1.6 million acres of the Reservation for homesteading. *See* Act of May 29, 1908, ch. 218, 35 Stat. 460 ("1908 Allotment Act"); *see South Dakota v. Bourland*, 508 U.S. 679, 682 (1993). This is where respondents Ronnie and Lila Long reside today.

2. This case involves predatory lending activities relating to both fee simple lands whose title derives from the 1908 Allotment Act and Indian trust lands. Beginning in the mid-1970s, the Long Company

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[1] *See* Act of July 20, 1867, ch. 32, 15 Stat. 17; *see also* Treaty of Fort Laramie (1851) (11 Stat. 749); Treaty of Fort Laramie (1868) (15 Stat. 635); Act of Mar. 2, 1889, ch. 405, §§ 1-6, 25 Stat. 888, 888-90 ("1889 Agreement").

grazed approximately 500 head of cattle year-round on 6,400 acres of Indian trust land (also known as a "Tribal Grazing Unit"). On a different parcel of approximately 2,230 acres owned in fee simple wholly within the Reservation, the Long family lived and farmed, raising crops and livestock. That fee land was purchased in 1958 by Kenneth Long, a non-member, and his wife Maxine, a Tribe member.[2] Together, they owned that land as joint tenants with right of survivorship until Maxine's death. *See* Affidavit of Ronnie and Lila Long ¶ 7 (D.S.D. filed Dec. 9, 2005) ("1st Aff.").

In 1987, the Long Company incorporated under South Dakota law as a family farm corporation to qualify for loans guaranteed by the BIA under 25 C.F.R. Part 103. Under BIA regulations, a corporation must be majority-owned by members of an Indian tribe. *See id.* § 103.25. From its inception and under its Articles of Incorporation requiring Indian majority ownership, *see* JA17, the Long Company was owned and controlled by tribal members Maxine Long and Ronnie and Lila Long. *See* 1st Aff. ¶ 6. (Ronnie is Kenneth and Maxine's son; Lila is Ronnie's wife. *See id.* ¶ 5.) When Kenneth died, he bequeathed his 49% share interest to Ronnie and three siblings, who then assigned their interests to Ronnie. *See id.* ¶ 9. Since Kenneth's death, in 1995, Ronnie and Lila Long have owned 100% of the Long Company's shares. *See id.*

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[2] According to property records examined by counsel in the Dewey County, South Dakota courthouse, all of the fee lands owned by non-member Kenneth Long and member Maxine Long were parcels first made available for sale under the 1908 Allotment Act.

In 1988, petitioner purchased the Longs' loans from another bank. *See* Third Affidavit of Ronnie and Lila Long ¶ 8 (D.S.D. filed Jan. 12, 2006) ("3d Aff."). From 1989 to 1996, petitioner provided additional loans to the Long Company and the Longs personally. *See* 1st Aff. ¶ 10; 3d Aff. ¶¶ 1-3. Those loans provided working capital for the Long Company. The BIA provided loan guarantees and interest-subsidy payments, both of which substantially reduced petitioner's risk. Notwithstanding those benefits, petitioner required the Long Company itself and the Longs personally to provide additional guarantees as conditions for obtaining the loans. *See* 3d Aff. ¶ 4.

From 1989 to 1996, petitioner annually made operating loans to the Longs to pay ranch expenses, to buy additional cattle for the Longs' cattle ranching operations, and to finance the moving of hay for winter cattle feed on the Tribal Grazing Unit where the cattle were located year-round. The Longs would repay the operating loan after that season's calves were sold. Petitioner's loans also enabled Ronnie Long to make annual lease payments of approximately $17,000 to the Tribe and Indian allottees for grazing privileges on the Tribal Grazing Unit; petitioner often made that lease payment directly to the CRST and the BIA for the Longs. *See* 3d Aff. ¶ 15. To secure these loans, petitioner required Kenneth and Maxine Long to mortgage their fee land. *See* Longs' C.A. App. 12, 22, 49-58. Petitioner also required Kenneth, Maxine, Ronnie, and Lila Long to grant to petitioner security interests in their equipment, vehicles, crops, feed, and livestock (including the cattle that grazed exclusively on the Tribal Grazing Unit). *See* 1st Aff. ¶ 10; Second

Affidavit of Ronnie and Lila Long at 4 (D.S.D. filed Dec. 22, 2005) ("2d Aff.").

As a condition for each loan, petitioner further required the Longs to obtain BIA guarantees. *See* 3d Aff. ¶ 11. Petitioner paid BIA premiums for those guarantees, each of which involved a three-party agreement that petitioner signed. *See id.* The guarantees specifically referenced the Indian Financing Act of 1974 and Interior Department regulations. *See id.* ¶ 10. The Longs' mortgage recorded at the Dewey County Courthouse also referenced the BIA loan guarantees. *See* 1st Aff. ¶ 10. Modifications of the guarantees requested by petitioner such as that in 1992 were duly signed by both the BIA and petitioner. *See* 3d Aff. ¶ 9.

Petitioner also insisted on micro-managing the Longs' checking accounts and ranch spending. Virtually all purchases of any significance required specific approval by petitioner. *See* Def. Ex. 1. In that way, petitioner maintained constant contact with the Longs and control of their expenditures. *See id.*; Trial Record ("TR") 198-204, 286-89, 318-22.

On July 17, 1995, Kenneth Long died. In his will, he devised his 2,230 acres owned in fee within the Reservation to his four children (one of whom was Ronnie), all of whom are members of the CRST. *See* 1st Aff. ¶ 9. Under South Dakota law, which has adopted the Uniform Probate Code and generally follows familiar common-law principles, the will immediately vested title in Ronnie and his siblings, subject to probate proceedings for Kenneth's estate. *See* South Dakota Codified Laws ("SDCL") § 29A-3-101; *see also In re Estate of Roehr*, 631 N.W.2d 600, 602 (S.D. 2001) (willed property "automatically vest[s]" in the devisee "at the time of [the testator's] death . . .

subject only to the probate of the estate"). Pursuant to subsequent assignments by his siblings, title to all 2,230 acres vested in Ronnie. *See* 1st Aff. ¶ 9.

Shortly before Kenneth died, he married Paulette Rowley. On July 28, 1995, the state court accepted Paulette's application to be the personal representative in Kenneth's probate proceeding, as authorized by SDCL § 29A-3-301, and admitted his will. *See* JA86; Notice of Informal Probate and Appointment of Personal Representative, *In re Estate of Kenneth L. Long*, No. 95-4 (8th Jud. Cir. Ct., Dewey Cty., S.D. filed July 28, 1995) ("*Probate Proceeding*").[3] On August 15, 1995, the Long children filed a Demand for Notice of "any action whatsoever dealing with any proposed transfer of property belonging to the estate, or any other actions pertaining to this matter." Demand for Notice, *Probate Proceeding* (filed Aug. 15, 1995). On September 26, 1995, petitioner submitted a statement of claim alleging debts owed by the Long Company and guaranteed by Kenneth Long in the total principal amount of $635,706.30 plus interest of $51,629.79. *See* Statement of Claim, *Probate Proceeding* (filed Oct. 6, 1995). Petitioner's claim therefore imputed all of the debts of the Long Company to Kenneth's estate. On the appraisal of property in the estate filed on October 12, 1995, the appraiser assigned a value of "0.00" to Kenneth's 49% share interest in the Long Company. *See* Inventory and Appraisement at 2, *Probate Proceeding* (filed Oct. 12, 1995). The appraisal therefore showed a false deficit in the estate of debts to assets of approximately $478,000. *See id.* at 3. Other creditors filed claims against the estate after October and

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[3] A complete and Clerk-certified set of the probate-court filings is available to be lodged with the Clerk upon request.

into early 1996, including a claim by the funeral home for expenses incurred for both Kenneth and Maxine Long.

In the spring of 1996, while Kenneth Long's estate was in probate, petitioner arranged a meeting on the Reservation to propose new financing for the Long Company. Petitioner inspected the Longs' fee land, met with them at their house, examined the cattle on the Tribal Grazing Unit, and met with CRST credit and finance officers at the tribal headquarters on trust land. *See* 3d Aff. ¶ 17. A bank lawyer represented petitioner, but the Longs were unrepresented. *See* 1st Aff. ¶ 15. Petitioner agreed to make operating and cattle-purchase loans requested by Ronnie Long, so long as the Longs deeded their house and fee land on the Reservation to petitioner. *See* 2d Aff. at 4. Petitioner would then sell the land back to them on a 20-year contract-for-deed.

Sometime after that meeting, petitioner unilaterally changed the terms of the bargain. In a letter to Ronnie, petitioner altered its promise to provide the Longs with financing to buy back their land under a 20-year contract-for-deed because of "possible jurisdictional problems" if petitioner sold the land on a contract "to an Indian owned entity on the reservation." JA91. In the revised agreement, petitioner changed the terms from a bank-financed 20-year contract-for-deed to a two-year lease-with-option-to-purchase, with a $468,000 balloon note due when the lease expired. *See* 2d Aff. at 5.

While it was offering this revised proposal to the Longs, petitioner was actively pressing for the filing of an Abandonment of Property in the Kenneth Long probate proceeding based on the false appraisal. That notice stated that "it is the opinion of the

personal representative that the real estate is so encumbered that it is of no benefit to the estate and that it would be to the advantage, benefit and best interests of the estate if the real estate is abandoned and transferred to [petitioner] which is the first mortgagee." Proposal for Abandonment of Real Estate ¶ 8, *Probate Proceeding* (filed Oct. 8, 1996). The probate court records do not show that any notice of these actions was provided to the Longs.

On October 29, 1996, petitioner's revised agreement produced another meeting involving the Longs, petitioner's officers and attorney, a BIA officer, and CRST financial planning officers. With winter fast approaching, the Longs had little choice but to accept petitioner's terms. Their most immediate need was to obtain an operating loan of $70,000 to feed and care for their cattle and an additional loan of $37,500 to purchase 110 calves to be fed and pastured with the Longs' other cattle on the Tribal Grazing Unit. *See* 2d Aff. at 5. Dennis Huber of the North Dakota/South Dakota Native American Business Development Center produced a cash-flow analysis for that meeting showing that the Longs could generate sufficient funds to make even petitioner's revised loan agreement workable. Petitioner and the BIA approved that cash-flow projection. *See* 3d Aff. ¶¶ 18-19; 2d Aff. at 6-7; Pls. Ex. 8A.

Despite the Longs' repeated requests for prompt action, petitioner delayed producing the final loan agreement documents for signature for five additional weeks after the October meeting. *See* 2d Aff. at 5. The documents finally produced — and drafted — by petitioner do not contain arbitration, choice-of-law, or choice-of-forum clauses. *See* JA96-103, 104-06 (Pls. Exs. 6, 7). Meanwhile, on December 2,

1996, the probate court authorized the abandonment. Paulette Long deeded the land to petitioner by Personal Representative's Deed filed December 27, 1996. *See* JA113-15 (Pls. Ex. 9).[4]

On December 5, 1996, Ronnie Long signed the loan agreement and the lease-with-option-to-purchase, relying on the Huber cash flow created in connection with the October 29, 1996 meeting. *See* Pls. Ex. 8A. The agreement contained the following terms:

- Petitioner agreed to make a $70,000 operating loan to the Long Company to feed and care for the Company's cattle;
- Petitioner agreed to make a $37,500 loan to the Long Company to purchase 110 additional cattle;
- The Longs deeded their 2,230 acres of agricultural land and their house to petitioner for a credit of $478,000 on their debt of $750,000 to petitioner;
- The Longs assigned their federal Conservation Reserve Program ("CRP") contract payments of $44,000 a year to petitioner;
- Petitioner leased the 2,230 acres back to the Longs for two years; and
- Petitioner granted the Longs an option to pay petitioner a $468,000 balloon payment in two years to recover the deed to their land.

*See* JA96-98, 104-05.

In the loan agreement, petitioner warranted that it had received title to what had been the Longs' land. *See* JA104 ("The Bank of Hoven has received a deed

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[4] The probate proceedings for Kenneth Long's estate were never closed.

to property described in exhibit A attached hereto, through the estate of Kenneth Long."). In fact, the official transfer ordered by the probate court did not occur until three weeks later — on December 27, 1996. *See* JA115. The Estate of Kenneth Long deeded the fee land and house to petitioner, subject to petitioner's loan commitments. Petitioner never made the promised operating loan of $70,000 or the $37,500 loan to purchase additional cattle.

On December 12, 1996, unbeknownst to respondents, petitioner sent to the BIA for approval a modified cash-flow analysis with loss projections showing that the Longs' cattle ranching operations would fail. *See* JA107-12 (Pls. Ex. 8); *see* 3d Aff. ¶ 19. Neither Dennis Huber nor Ronnie Long had ever seen petitioner's modified cash flow, which was dated December 11, 1996 (and thus did not exist when the Longs signed the agreements on December 5, 1996, which were based on the Huber cash-flow projections of October 29, 1996). *See* Pls. Ex. 8A.

Petitioner's failure to pay the promised loans had catastrophic consequences for the Longs and their company. In early December 1996, when respondents made the agreement with petitioner, winter was upon them. Petitioner knew that without the operating loan the Longs could not provide feed to their cattle, without feed the cattle would starve to death, and without the cattle the Longs could not repay their loan or obtain any refinancing to repurchase their land. *See* 1st Aff. ¶ 17.

Despite respondents' repeated efforts to procure the promised funds to pay $20,000 in transportation costs to move the hay to the cattle, or even $2,000 needed to insure the cattle against winter death loss, petitioner refused to provide the necessary

funds. *See* JA120-22. BIA-guaranteed emergency loans were available for precisely such events. *See* 25 C.F.R. § 103.22 (2000). But, despite the Longs' requests for such assistance, petitioner never made any such emergency loans.

When severe winter storms struck the area in January 1997, the cattle ran out of feed. More than 500 cows and calves died. Their carcasses were discovered on the Tribal Grazing Unit. The Long family cattle ranching business — in operation for more than five decades — was wiped out. When the two-year note came due, the Longs could not repay petitioner the money to repurchase their land.

Prior to the lease's termination, Ronnie Long wrote to petitioner requesting a 60-day extension to raise financing to repurchase their land. *See* JA139 (Pls. Ex. 17). Petitioner rejected the request (*see* JA140 (Pls. Ex. 18)) and pursued purchasers for the property. In 1999, petitioner sold the Longs' land to non-Indians[5] on terms substantially more favorable than petitioner had offered the Longs and, indeed, on terms that the Longs could have satisfied. Instead of a loan requiring a two-year balloon payment of $468,000, the non-Indians paid only $23,229 per year. Because those parcels were productive farm land — and eligible for federal agricultural subsidies and other benefits totaling at least $23,000 per year — the non-Indians obtained the Longs' land essentially at no cost. *See* JA148-57 (Pls. Ex. 21).

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[5] In Tribal Court, respondents named as defendants the non-Indians who had purchased their land from petitioner, the Maciejewskis and the Pesickas. After trial, the Maciejewskis abandoned the litigation. They are not parties here and therefore have waived any claim to relief.

**3. a.** On May 19, 1999, petitioner initiated litigation against respondents in Tribal Court by issuing a Notice to Quit on the "[Long Company] and Ronnie Long." JA144 (Pls. Ex. 20). Petitioner did not use any of the forms of service of process authorized under South Dakota state law, which specifically permits service of process on Indians in Indian Country. *See* SDCL § 15-6-4(c).[6] Nor did it use state law to serve the Long Company, even though it was incorporated under state law (with a designated agent for service of process). *See* JA144. Rather, petitioner asked the Tribal Court to serve the Notice to Quit on Ronnie Long and the Long Company. *See* JA146.

In response to the Notice to Quit, on July 2, 1999, respondents sought an injunction from the Tribal Court prohibiting their eviction and restraining petitioner from selling the land. On July 13, petitioner responded to the Longs' petition for a temporary restraining order. On July 30, Chief Judge Bluespruce held a hearing and denied the Longs' motion because they were unable to provide the security required under tribal law. The case proceeded on the request for an injunction.[7] Subsequently, because of the case's complexity, the CRST appointed Professor B.J. Jones, a member of the South Dakota Bar and a non-Indian who specializes in tribal law at the University of North Dakota Law School, to serve as Special

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[6] *See Bradley v. Deloria*, 587 N.W.2d 591, 594-95 (S.D. 1998) (per curiam) ("[P]rocess is effective on a reservation . . . provided the service complies with . . . SDCL 15-6-4(c).").

[7] That opinion is summarized in pertinent part in Judge Jones's order denying petitioner's motion for summary judgment, which was filed on September 30, 2002.

Judge over the matter.[8] Judge Jones presided over the remainder of the case, including the trial and post-trial motions.

Under the CRST Law and Order Code, the Tribal Court has incorporated the Federal Rules of Civil Procedure and Appellate Procedure. *See* CRST R. Civ. P. 1(d) (1978). Respondents filed an amended complaint on January 3, 2000, to include claims for fraud and deceit, breach of contract, failure of consideration, a declaration that the deed to petitioner was void, self-help, discrimination, bad faith, and unconscionable contract. *See* JA163-75. The discrimination claim does not identify the source of law underlying it. *See* JA172-73. The relief requested in the discrimination claim is that "[t]he land sales by the bank to the Pesickas and Maciejewskis should be set aside, and the Longs should get possession and title to their land back." JA173. The discrimination claim does not request monetary damages. *See id.*

Instead of filing motions to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), to dismiss for a failure to state a claim under Rule 12(b)(6), or to clarify the claims under Rule 12(e), on February 3, 2000, petitioner filed an Answer and Counterclaim against the Longs, seeking eviction and monetary damages. *See* JA180. In that pleading, petitioner contested subject-matter jurisdiction in its answer but stated in its counterclaim that, "although Defendants deny jurisdiction of the Court, in the event the Court finds that it does have jurisdiction, both Defendants make this Counterclaim against Plaintiffs." JA184.

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[8] Judge Jones's biographical information is available at http://www.law.und.edu/LawFaculty/jones.php.

On September 12, 2002, petitioner filed a motion for summary judgment on its counterclaim for eviction. In that motion, petitioner stated that "[t]he Court has jurisdiction over [the Long Company] and Ronnie Long and Lila Long in that the majority ownership of the corporation is owned by Ronnie Long and Lila Long, enrolled members of the [CRST] and the Court has jurisdiction over the subject matter of this action." JA187-88. Petitioner did not qualify its summary judgment motion concession on subject-matter jurisdiction in any way. *See id.*

In ruling on petitioner's motion for summary judgment on its eviction counterclaim, Judge Jones rejected respondents' argument that petitioner had obtained title to the Longs' land through fraud on the probate court. Judge Jones ruled that such matters should be brought to the state court in the first instance and that the CRST Court of Appeals "has directed this Court to maintain positive relations with state courts by attempting to honor their decisions." Order at 5 (Sept. 30, 2002) (citing cases). Judge Jones nonetheless held that a dispute of material fact existed as to whether petitioner had breached its loan agreement and whether such breach was a condition precedent to the parties' performance under the lease-purchase agreement. Judge Jones noted that petitioner disagreed that the two agreements were "related," *id.* at 6, but concluded that a trier of fact could find otherwise. The court thus rejected petitioner's motion for summary judgment on its counterclaim and set that issue for trial. *See id.* at 7-9. In a subsequent pre-trial ruling, Judge Jones ruled that the Tribal Court had subject-matter jurisdiction over all of respondents' claims, but dismissed the Longs' claim seeking rescission of

the deed based on fraud, holding that the appropriate forum for claims relating to the deed was the state probate court. *See* Order at 1 (Dec. 5, 2002).

The case proceeded to a two-day jury trial. Under the CRST Law and Order Code, a non-member litigant may request that non-members of the Tribe be empanelled as jurors, *see* CRST Law & Order Code § 1-6-1(2) (1978), but petitioner did not make such a request. Respondents' evidence on damages related solely to their breach-of-contract claim and totaled $1,753,110. *See* JA197-202. Respondents did not submit any evidence on monetary damages for their discrimination claim. *See* 3d Aff. ¶ 23 ("The Longs did not request any damages for discrimination and did not request punitive damages."). For discrimination, respondents instead sought the equitable remedy of the return of their land from the non-Indian purchasers. *See* JA173. A seven-member jury answered five substantive interrogatory questions unanimously — finding that petitioner breached the loan agreement, that the breach prevented the Longs from performing under the lease, that petitioner did not use improper self-help remedies, that petitioner discriminated against the Longs based on their Indian status, and that petitioner acted in bad faith regarding an increase in the BIA guarantee. *See* JA190-92. The jury awarded the Longs $750,000 plus prejudgment interest. *See* JA192, 195. Additionally, in a supplemental judgment, the Tribal Court decreed that the Longs could enforce the original option to purchase the 960 acres they currently occupied, but that petitioner's previous sales of two parcels of the Longs' land to the Maciejewskis and Pesickas would not be voided. Judge Jones reasoned that the jury had found for petitioner on the self-help

claim, which he construed to mean that "the sale of the land to the other parties was not done in violation of tribal law." Pet. App. A69. The jury thus rendered inconsistent findings on respondents' self-help and discrimination claims, which Judge Jones resolved in the supplemental judgment in petitioner's favor. *See id.* at A70-A71.

**3. b.** Both sides appealed to the CRST Court of Appeals, which consisted of a three-judge panel with two non-Indian judges (Chief Judge Frank Pommerscheim and Patrick Lee). Petitioner argued that the Tribal Court did not have subject-matter jurisdiction to hear the discrimination claim. The court of appeals held that that claim was based on tribal law. The court also held that petitioner's actions satisfied both *Montana* exceptions. Finally, the court affirmed the Longs' successful causes of action in addition to the Tribal Court's decision to restrict the Longs' repurchase option to the 960-acre parcel respondents continued to possess.

**3. c.** At the same time petitioner was litigating against respondents in Tribal Court, it was prosecuting a state-court action against them. On July 8, 1999, and following service of the Notice to Quit, petitioner filed a lawsuit against the Long Company and Rhonda Long (Ronnie and Lila's daughter) in the Eighth Judicial Circuit Court of South Dakota. *See* Complaint, *Bank of Hoven v. Long Family Land & Cattle Co.*, No. 99-21 (8th Jud. Cir. Ct., Dewey Cty., filed July 8, 1999).[9] The complaint alleged wrongful holdover of the Longs' land and sought $31,708.86

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[9] A complete and Clerk-certified set of the state-court filings of that case is available to be lodged with the Clerk upon request.

in damages, twice the claimed actual damages, and removal of the Longs from the land. *See id.* ¶ 12.

The complaint stated expressly that "Plaintiff [petitioner] has served notice as is required under SDCL 21-16-1 upon defendant, [the Long Company]." *Id.* ¶ 9. The Longs did not contest service. On September 17, 1999, they filed an answer to the complaint, which averred expressly as follows: "Plaintiff [petitioner] filed the Notice to Quit . . . in the [CRSTC] . . . and served the Notice to Quit through the [CRSTC] . . . [and] has thereby previously submitted this matter to the jurisdiction of the [CRSTC]." Answer ¶ 13.

Apart from two notices to take the depositions of Ronnie and Lila Long, which petitioner filed in December 1999, petitioner took no action in this state-court proceeding. On December 7, 2004, the Longs' counsel wrote to the state court that "[i]t appears that this case can be dismissed because the issues between the parties have been litigated in the [CRSTC] and CRST Appellate Court." Letter from James P. Hurley to Hon. Warren G. Johnson (Dec. 7, 2004). On December 13, 2004, petitioner's counsel responded in a letter to the state court that stated in its entirety: "The above-entitled matter was commenced and has been in abeyance pending a [CRSTC] trial and Tribal Appellate Court decision. I would not object to the court dismissing the action, however, I would request that it be dismissed without prejudice." Letter from David A. Von Wald to Hon. Warren G. Johnson (Dec. 13, 2004). On December 23, 2004, the state court dismissed the case "without prejudice, and without costs to either party." Order (4th Jud. Cir. Ct., Dewey Cty., S.D. Dec. 23, 2004). The order of dismissal references and

attaches "the letter responses of counsel in response to the Court's notice of intent to dismiss for failure to prosecute." *Id.*

4. On January 7, 2005, petitioner filed a complaint seeking declaratory and related relief in federal district court. Petitioner alleged that the Tribal Court lacked subject-matter jurisdiction and denied it due process of law. On cross-motions for summary judgment, the court noted that, on appeal to the CRST Court of Appeals, petitioner did not generally appeal the jurisdiction of the Tribal Court over the lawsuit brought by the Longs, but rather appealed only the Tribal Court's subject-matter jurisdiction as to the discrimination claim. *See* Pet. App. A32.

The court then identified "the issue presented here [a]s whether this lawsuit falls within one of the *Montana* exceptions." *Id.* at A33. The court rejected petitioner's argument that the relationship between it and respondents was nothing more than a relationship between two non-member corporations:

> This assessment . . . very much ignores important facts of this case. The Long Company is a closely held corporation. CRST members have controlled at least 51% of the Long Company's outstanding stock at all times pertinent to this action. Native American control was necessary in order for the Long Company to qualify for BIA guarantees. The BIA guarantees allowed the bank to make loans to the Longs with greatly reduced risk. . . . [T]he loan agreements between the bank and the Long Company were not only crafted with tribal membership in mind; they would not likely have been possible without it.

*Id.* at A34-A35. The court held that petitioner's conduct — "enter[ing] consensual relationships with tribal members through commercial dealings, contracts, leases, or other arrangements," *id.* at A40-A41 — satisfied *Montana*'s first exception. In addition, the court found that petitioner had made a "significant concession" before the Tribal Court — conceding in its motion for summary judgment that "the Court has jurisdiction over the subject matter of this action" — and that petitioner "should be held to it." *Id.* at A40.[10]

**5.** The Eighth Circuit affirmed. The court of appeals rejected petitioner's arguments "that the tribal courts lacked jurisdiction over the Longs' discrimination claim and that it was denied due process by the tribal proceedings." Pet. App. A1-A2. The court also rejected petitioner's argument that it never formed a consensual relationship with a tribal member because the loan agreements were with the Long Company (a South Dakota corporation), stating:

> Because the bank not only transacted with a corporation of conspicuous tribal character, but also formed concrete commercial relationships with the Indian owners of that corporation, we conclude that it engaged in the kind of consensual relationship contemplated by *Montana*. . . . The Tribe's interest in regulating commercial transactions between its members and nonmembers does not disappear just because a corporation is also a party to those

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[10] Petitioner also argued it was denied due process in Tribal Court because it did not receive proper notice that it was facing a tribal law and not a federal-law discrimination claim. The courts below rejected that claim, *see* Pet. App. A21, A41-A44, and petitioner abandons it here, *see* Pet. i n.1.

> transactions. That the Tribe was actively involved in facilitating negotiations between the Longs and the bank confirms that the Tribe had its own interest in facilitating the commercial endeavors of its members and in ensuring that they are not unfairly dispossessed of reservation land.

*Id.* at A12 (citation omitted). In holding that the Tribe has authority to regulate petitioner's conduct arising out of its consensual relationship with respondents,[11] the court found that "this case is not about a tribe's power to govern nonmembers 'just because they enter the tribe's territory.' Rather, this case is about the power of the Tribe to hold nonmembers like [petitioner] to a minimum standard of fairness when they voluntarily deal with tribal members." *Id.* at A13 (citation omitted).

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[11] Neither the district court nor the court of appeals resolved *Montana*'s second exception. *See* Pet. App. A14 n.7.

## SUMMARY OF ARGUMENT

I. Petitioner lacks Article III standing to pursue its challenge to the exercise of tribal-court authority here. As this case comes to this Court, petitioner has waived its jurisdictional challenge to all claims asserted against it in Tribal Court other than a single tort claim for discrimination. Petitioner's question presented, its federal district court complaint, and its briefing here make clear that petitioner's challenge is limited to the discrimination claim.

The only relief granted by the Tribal Court, however — damages for the loss of respondents' cattle — was based on the breach-of-contract and bad-faith claims that petitioner failed to bring before this Court in the question presented. Respondents' complaint, the trial proceedings, the jury verdict, and the post-trial motions point to one conclusion: the relief that the Tribal Court granted against petitioner was based on petitioner's breach of contract. With respect to the discrimination claim, respondents did not seek monetary damages in the Tribal Court, but rather equitable remedies that would allow respondents to repurchase all of the land at issue. The jury denied respondents that relief. Respondents moved for reconsideration, but the Tribal Court granted only a limited remedy that allowed respondents to repurchase part of their land and based that remedy only upon petitioner's breach of contract.

The record establishes that the Tribal Court granted no relief against petitioner on respondents' discrimination claim. Petitioner thus effectively prevailed on that claim, and yet seeks to base this Court's review only on that claim. Given those facts, petitioner has failed to carry its burden of establishing constitutional injury-in-fact to support Article III

jurisdiction. Alternatively, because petitioner has not challenged the Tribal Court's jurisdiction over the breach-of-contract claim, this Court should affirm on that alternate ground or dismiss the writ as improvidently granted.

**II.** If this Court reaches the merits, a straightforward application of the framework established by this Court in *Montana* demonstrates that the Tribal Court properly exercised jurisdiction over respondents' discrimination claim.

**A.** *Montana*'s consensual-relationship exception governs here. All four courts below applied that exception on this record to find that, "by enter[ing] . . . agreements [and] dealings with" respondents and other tribal members, petitioner "subject[ed] [itself] to tribal civil jurisdiction" in connection with those agreements and dealings. *Montana*, 450 U.S. at 566. Indeed, petitioner functionally concedes that point generally by failing to challenge the Tribal Court's exercise of jurisdiction over the contract claims.

Petitioner consented to tribal civil authority through its extensive and lengthy on-reservation commercial relationship with the Long Company — an Indian-owned entity — and Long family members who also were tribal members. Crucially, petitioner has known since the inception of that relationship that it was dealing with an Indian-owned entity, as it benefited substantially from the BIA-guaranteed loans that accompanied that status. The commercial relationship that gave rise to respondents' discrimination claim, moreover, involved both member-owned fee and tribal trust land within the Reservation. Given petitioner's substantial business dealings with Indians on the CRST Reservation and the benefits it received from the Indian-owned status

of the Long Company, this case presents precisely the type of consensual relationship envisioned by *Montana*'s first exception.

In addition to consenting to tribal civil authority generally, petitioner consented to the exercise of tribal *adjudicatory* authority. Petitioner itself first invoked the jurisdiction of the CRST courts, abandoned a state-court action and elected to pursue its remedies through the CRST judicial system, and then stipulated to tribal adjudicatory jurisdiction over the matters in this case in moving for summary judgment. The combination of petitioner's long-standing commercial dealings and its litigation conduct establish the propriety of jurisdiction under *Montana*'s first exception.

**B.** Alternatively, the Tribal Court properly exercised jurisdiction under *Montana*'s second exception, which recognizes a tribe's inherent "civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. This case involves predatory and discriminatory lending practices directed at tribal members and fits within the narrow category of conduct that imperils the economic security of the Tribe. Petitioner's conduct ruined the Long Company. Given the centrality of ranching to the Tribe as well as the federal government's interest in protecting Indian-owned entities from predatory practices that undermine the objectives of the BIA loan program, *Montana*'s second exception independently sustains jurisdiction. Because neither court below found it necessary to reach the applicability of this exception, if this Court does reach the second

*Montana* exception, it may wish to remand for development of a factual record.

## ARGUMENT

### I. THE COURT LACKS JURISDICTION OVER THIS CASE BECAUSE PETITIONER CANNOT SHOW THAT IT HAS STANDING GIVEN THAT IT PREVAILED ON THE DISCRIMINATION CLAIM

Article III of the Constitution limits federal judicial power to resolution of "Cases" and "Controversies," "and Article III standing enforces the Constitution's case-or-controversy requirement." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (internal quotations and ellipsis omitted). Standing "requires a plaintiff to demonstrate . . . injury in fact, causation, and redressability." *Lance v. Coffman*, 127 S. Ct. 1194, 1196 (2007) (per curiam). Standing elements, moreover, "are not mere pleading requirements," and thus "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

As the case comes to this Court, petitioner has waived its jurisdictional challenge to all claims asserted against it in Tribal Court except the tort claim for discrimination. *See* Pet. i. But petitioner cannot show that it suffered any injury-in-fact arising from the jury's discrimination verdict. The relief granted in the Tribal Court arose entirely from petitioner's breach of contract. In a post-trial order, the Tribal Court rejected respondents' attempt to obtain relief on the discrimination claim. In short, respondents received no order remedying the jury's finding of

discrimination and thus petitioner is not injured by the only claim it now seeks to challenge. A jury finding superseded by a final judgment does not cause petitioner any constitutionally cognizable injury.

### A. The Tribal Court's Jurisdiction Over The Contract Claims Is Not Before This Court

Respondents' amended complaint (JA158-79) raises several claims, but only the discrimination claim is before this Court. The petition presents only the question whether the Tribal Court had jurisdiction "to adjudicate civil *tort* claims." Pet. i (emphasis added). Although recognizing that respondents asserted a cause of action for "breach of contract" (Pet. 3), petitioner's argument also addresses only the tort claim. *E.g.*, Pet. 14 (complaining that petitioner "was subjected to tribal tort claims in tribal court"). Even the certiorari-stage reply brief — which in any event would have been too late to expand the scope of the question presented — refers constantly to tort claims.[12] Indeed, the reply brief concludes (at 11) by rephrasing the "narrow . . . question" that petitioner presents: "Does a tribal court have civil adjudicatory jurisdiction over a nonmember defendant to litigate tort claims . . . ?"[13]

In presenting its tort-specific question and making its corresponding argument, petitioner necessarily

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[12] *See also, e.g.*, Reply Br. 4 ("[I]t does not follow that the nonmember may be forced to defend against civil *tort* claims in tribal court."), 5 (discussing tribal courts' jurisdiction "over common-law *tort* claims"), 9 (calling on this Court to "determine whether tribal courts have jurisdiction over *tort* claims against nonmember defendants") (emphasis added in each quotation).

[13] *See also* Pet. Br. 2-3 (discussing "common-law tort claims"), 12 (same); *id.* at 11 (noting district court upheld jurisdiction "over the discrimination claim").

refers only to the discrimination claim. Not only is that the only tort claim mentioned in the petition (*e.g.*, Pet. 3, 9, 12), it is the only tort claim on which the jury rendered a special interrogatory finding against petitioner. *See* JA190-92.[14]

In addition to the discrimination claim, the jury found for respondents on two contract claims — one for breach of contract[15] and one for bad faith in the performance of the contract.[16] Those contract claims are indisputably different from the tort claim that petitioner included in the question presented. Indeed, petitioner argues vigorously that "the discrimination tort at issue" in this case is entirely distinct from "a breach of contract." Br. 34. Because the two contract claims are neither set out nor fairly included in "civil tort claims," they are not before the Court. *See* Sup. Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari."). Because this is a separate declaratory judgment action launched by petitioner in federal district court to attack collaterally aspects of the Tribal Court's judgment — and not a direct

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[14] None of respondents' other tort claims either made it to the jury or prevailed.

[15] Petitioner breached the contract by failing to provide agreed-upon loans needed for the survival and expansion of respondents' cattle herd. The jury decided that petitioner breached the December 5, 1996 loan agreement with respondents. *See* JA190; Pet. App. A57-A59.

[16] A bad-faith claim arises from a breach of the covenant of good faith and fair dealing implied in every contract. *See Restatement (Second) of Contracts* § 205 (1981). The jury decided that petitioner breached that covenant by failing to diligently pursue an increase in the level of BIA guarantee for loans to respondents. *See* JA192; Pet. App. A59-A60.

appeal of the Tribal Court's judgment itself — petitioner cannot now challenge the remedies that the Tribal Court ordered on the basis of the contract claims when it failed to press its challenge to those claims in its petition for certiorari.[17]

### B. The Relief Granted By The Tribal Court Was Based Entirely On Respondents' Contract Claims, Which Are Not Before This Court, And Not On The Tort Claim That Is Included In The Question Presented

The relief granted by the Tribal Court was not based on the tort claim that petitioner now argues was outside of that court's jurisdiction. The relief was based entirely on petitioner's breach of contract, as shown by respondents' complaint, the trial proceedings, the verdict, and the post-trial motions.

#### 1. Respondents' complaint sought damages on the basis of their contract claims

The complaint demanded monetary damages based on petitioner's breach of its contractual obligations. The amended complaint contained nine counts

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[17] Petitioner's declaratory judgment action in federal district court asserted generally that: the Tribal Court lacked jurisdiction over it; petitioner was not afforded due process in Tribal Court proceedings; and respondents were not entitled to possess the 960 acres. As explained in text, petitioner has narrowed its first claim to relief solely to the discrimination claim and abandoned its second claim to relief. On its third count, petitioner lacks standing because the discrimination claim does not support that remedy, the only claim on which petitioner now challenges the Tribal Court's jurisdiction. Based on its declaratory judgment action — as narrowed by its subsequent submissions — petitioner no longer avers any concrete injury-in-fact that would be redressable by a favorable decision of this Court.

(JA163-76), including breach of contract (Count 2, JA165-67), discrimination (Count 6, JA172-73), and bad faith (Count 7, JA174). But the amended complaint attributed the loss of respondents' livestock (which was the underlying basis for all of the relief awarded) only to the contract claims.

Count 2 alleged that, "[a]s a direct result of [petitioner's] breach of the agreement, [respondents] lost 230 cows, 260 yearlings, and 3 horses," and that this "caused [respondents] to be financially unable to buy back their land from [petitioner]." JA167. Count 7 alleged that the actions constituting bad faith "caused [respondents] to suffer substantial losses for which [petitioner] is liable." JA174. Count 6, in contrast, claimed that petitioner's discrimination "prevented [respondents] from buying back their land from [petitioner]." JA173. There is no allegation that petitioner's discrimination caused the loss of any livestock.

The prayer for relief requested specific damages, injunctive relief, or both for each count *except* discrimination.[18] JA177-79. On the breach-of-contract claim, respondents requested "damages directly resulting from [petitioner's] breach of agreement in an amount determined at trial; and that title and possession of the 2,225 acres of land be returned to [respondents]." JA177. On the bad-faith claim, they requested "damages and losses suffered by [respon-

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[18] The first eight paragraphs of the prayer for relief correspond precisely with eight of the nine counts. Only for the discrimination count is no specific relief sought. Only paragraph 10, which generally requested "such and further relief as is just and equitable under these circumstances," JA179, could possibly be construed as seeking recovery on the discrimination count.

dents] in the amount determined at trial." JA178. The discrimination claim alleged only that "the Longs should get possession and title to their land back." JA173.

**2. At trial, respondents sought damages only on the basis of their contract claims**

Throughout trial, respondents' argument for substantial relief was based on their contract claims. In the opening statement, they explained that the evidence would show that petitioner's failure to provide promised loans caused their loss of livestock in the winter of 1996-1997 and their inability to exercise the repurchase option under the loan agreement. *See* TR77-78. The discrimination claim was not mentioned. *See* TR72-79.

Both Ronnie Long's trial testimony and the evidence of damages admitted on the basis of that testimony show that respondents' claims for monetary damages were based only on petitioner's breach of its contractual duties. Respondents offered proof of damages from three causes: the loss of their livestock during the winter of 1996-1997; the loss of the loan to purchase 110 calves; and the loss of the ability to exercise the option to purchase the land. *See* JA197-202; TR171-76, 300-07. Ronnie calculated the damages on the basis of expected offspring and proceeds from the lost animals and CRP payments for the use of the land. *See* JA197-202, TR171-76, 300-07. Admitted into evidence as "Exhibit 23, Plaintiffs' Damages," his calculations totaled $1,236,792. *See* Pet. App. A60; TR308; JA197-201. All of those damages, he testified, resulted from petitioner's failure to perform its contractual obligations under the loan

agreement.[19] Ronnie also testified that, without the operating loan promised under the contract, he could not be in a position to exercise the option to purchase the land. *See* TR172.

The jury instructions also confirm that respondents' damages derived only from the contract claims. Instructions 8, 10, 10A, and 15 explained the breach-of-contract and bad-faith claims, described the measure of damages for a breach of contract and prejudgment interest, and discussed the duty to mitigate. Only Instruction 17 mentioned the discrimination claim, and it simply explained the legal standard to find discrimination. Those instructions, which the jury should be presumed to have followed, did not mention damages.

The closing statements similarly demonstrate that Exhibit 23, Ronnie Long's calculations of damages resulting from petitioner's breach of its contractual duties, *see* TR171-76, 300-07, exhaustively accounted for the damages that respondents asked the jury to award. Respondents' closing statement focused on the contract claim and attributed the Exhibit 23 damages to petitioner's breach of contract. There was no mention of damages and no reference to Exhibit 23 in connection with the discrimination claim.

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[19] On direct examination, Ronnie Long (who had prepared the calculations in Exhibit 23) testified that the damages in Exhibit 23 were caused by petitioner's failure to provide the operating loan in breach of contract. *See* TR172. On cross-examination, he was asked, "[A]ll of those damages you claim are the result of . . . it's being the Bank's fault that you lost your cattle, right?" TR326. Long answered, "Yes." *Id.* He was then asked, "If it wasn't the Bank's fault that you lost your cattle, would you be entitled to any of those damages?" He answered, "No." *Id.*

### 3. The verdict shows that the damages awarded by the Tribal Court were based on respondents' contract claims

The jury awarded respondents $750,000 in damages, a substantial reduction from the amount proved in evidence. Because the jury was instructed that interest could *not* be awarded for punitive damages or intangible damages, *see* TR582, and the jury specifically found that interest should be added to the judgment, *see* JA192, that sum necessarily represents tangible, compensatory damages — that is, damages awarded on a breach-of-contract claim.

The CRST Court of Appeals upheld the damages verdict on the basis that "[respondents] provided extensive evidentiary data and testimony relative to their damages." Pet. App. A61. The court explained that "[respondents] sought damages in the amount of $1,236,792 (Exhibit 23) and thus the award of $750,000 represents an award of only 60% of the amount requested." *Id.* at A60. The CRST appellate court therefore recognized that the damages award was based entirely on Exhibit 23, which represented damages for breach of contract.

### 4. The Tribal Court's equitable relief was based on respondents' contract claims

Before the Tribal Court, respondents alleged that petitioner discriminated against them by selling the land at issue to non-Indians "on terms more favorable than [petitioner] required of the Longs." JA173. Petitioner counterclaimed to evict respondents from the 960-acre parcel that they occupied. *See* JA184. Respondents offered no evidence of monetary damages on discrimination but instead sought title to the entire 2,230 acres. *See* JA173. The jury answered a special interrogatory finding that petitioner had

discriminated against the Longs. *See* JA191. But it also answered a special interrogatory that petitioner had *not* violated a prohibition on self-help remedies by its sales of that land to the Maciejewskis and Pesickas. *See id.*

The Tribal Court initially rejected respondents' request for return of their land, awarding only monetary damages for breach of contract. *See* JA194-96. Respondents moved for reconsideration, arguing that the jury's breach-of-contract finding excused their failure to repurchase the land within the contractually permitted two-year period. *See* Pet. App. A70. In a supplemental judgment, the Tribal Court granted the motion, but only in part and in a way demonstrating that the final judgment was based on petitioner's breach of contract, not discrimination.

Specifically, the court refused to allow respondents to repurchase all 2,230 acres, which it held would be inconsistent with the jury's self-help finding: "The jury ruled against [respondents] on their theory that the conveyances to the other Defendants violated the law." *Id.* The court explained it lacked "the authority to set aside the contracts for deed [petitioner] entered into with the other [parties]." *Id.* It then found that "the only legal issue presented by [petitioner's] counterclaim was whether the Court should evict [respondents] from the 960 acres they presently occupy." *Id.* Formulating an equitable remedy for petitioner's breach of contract (not for its discrimination) in light of the jury's rejection of petitioner's eviction counterclaim, the court held that respondents "continue to possess an option to purchase the 960 acres they presently occupy." *Id.* Thus, the court concluded that respondents had a right to

purchase only the land they possessed "at the amount per acre contemplated in the original option." *Id.*

### C. Because The Tribal Court Granted No Relief On Respondents' Tort Claim, Petitioner Has No Standing To Challenge The Tribal Court's Jurisdiction Over The Tort Claim

Because respondents received no relief on their tort claim — despite the jury's discrimination finding — petitioner effectively prevailed on respondents' discrimination claim. Thus it has no standing to challenge the Tribal Court's jurisdiction over the claim, which is the only question presented here. Arguments that petitioner might make in support of its standing are unpersuasive.

#### 1. The Tribal Court's equitable relief does not justify standing

Although the Tribal Court denied respondents' request to recover title to their entire 2,230 acres, it allowed them to repurchase the 960 acres that they have continued to occupy. That relief does not confer standing on petitioner. First, as explained above, that relief was expressly based on petitioner's breach of its contractual obligations, *not* on its discrimination against the Longs. *See* Pet. App. A70-A71. Even if the equitable remedy had been based on the discrimination, reversing the grant of relief would not benefit petitioner.

Under its deed of sale with the Maciejewskis, petitioner had sold the land for the same per-acre price as in the original lease-repurchase agreement with respondents, albeit on financing terms that were more favorable to the buyer than respondents had received. *See* JA173 (sale to Maciejewskis was for

1,905 acres for $401,100, or approximately $210 per acre, with generous financing). Under the Tribal Court's supplemental judgment, the court ordered that respondents "are entitled to exercise the option to purchase the 960 acres they presently occupy in the amount of $201,600" (Pet. App. A71), or $210 per acre. Thus, petitioner received the same amount per acre under the Tribal Court's supplemental judgment as under its sale to the Maciejewskis.

In the Tribal Court, petitioner had suggested that the proposed supplemental judgment was unfair because of a change in land values. But, as petitioner's own federal allegations make clear, it was subject to a contractual obligation to sell those 960 acres, *see* Compl. ¶ 18 (land subject to option was "under a contract for deed" with "Maciejewski[s]"), and that contract included the same price-per-acre terms as petitioner would sell to respondents, *see* JA173. The Tribal Court thus correctly rejected petitioner's land-value assertion, and petitioner has not subsequently pressed it. Importantly, the Maciejewskis dropped out of this litigation and no longer contest the Tribal Court's order invalidating the sale of the 960-acre parcel to them. Thus, petitioner can claim no possible injury-in-fact from an order to sell land to respondents on the same per-acre sale terms as it agreed to sell to the Maciejewskis. In any event, petitioner has not satisfied its burden to establish any concrete injury from that judgment.

**2. Petitioner has waived any argument that the discrimination claim tainted the proceedings**

Nor does the jury's answer to Special Interrogatory No. 6 (JA192) support petitioner's standing. That interrogatory asked that, if the jury answered

"yes" to any of the preceding special interrogatories (including discrimination), it could award monetary damages. In the CRST Court of Appeals, petitioner argued extensively that the monetary damages award was "tainted" by the mere existence of the discrimination claim in the case. Pet. App. A61. That court rejected petitioner's assertion on multiple grounds — including petitioner's having waived numerous opportunities to object at trial to the supposed taint (*see id.* at A60-A62). Even if that complaint were accurate, however, petitioner correctly identified that as only a due process argument (*see id.* at A61), which it explicitly declined to pursue in this Court. *See* Pet. i & n.1. As set forth above, because the monetary damages award was in no way supported by the discrimination claim, petitioner cannot sustain its standing on that slim basis alone.

* * *

Given the jury's rejection of respondents' self-help claim and the Tribal Court's rejection of the equitable remedy sought by respondents for discrimination, petitioner can point to nothing to establish constitutional injury.[20] This Court has held that a request for relief that is "worthless" to a party does not give rise to a justiciable controversy. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104-06 (1998). That principle applies here. In view of petitioner's failure to establish injury-in-fact, the Court need not address any novel questions of standing law to decide

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[20] The CRST Court of Appeals noted that petitioner had waived any challenge to respondents' damages calculation. *See* Pet. App. A60-A62. In its federal complaint, petitioner similarly waived any argument of excessive monetary damages and did not assert that any component of the monetary damages derived from the discrimination claim.

this case. Rather, it should dismiss the case on the ground that, on summary judgment, "plaintiff can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts." *Lujan*, 504 U.S. at 561 (internal quotations omitted). Petitioner's failure to prove facts constituting injury-in-fact warrants dismissal of the case for lack of jurisdiction.

### D. Even If Petitioner Had Standing To Challenge The Tribal Court's Jurisdiction Over The Tort Claim, The Judgment Should Still Be Affirmed On Alternate Grounds

Because petitioner has not challenged the Tribal Court's jurisdiction over the breach-of-contract claim on which relief was granted, the decision below should simply be affirmed on that basis.[21] Even if respondents had never filed their tort claim, or if the jury had found for petitioner on the tort claim, respondents still would have obtained exactly the same relief. By rejecting respondents' requested remedy for discrimination in its supplemental judgment, the Tribal Court functionally nullified the finding of discrimination by the jury and based all of the relief awarded to respondents on a breach-of-contract claim no longer contested by petitioner.

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[21] Alternatively, if this Court prefers not to consider the standing issues, it may prefer to dismiss the petition as improvidently granted.

## II. UNDER *MONTANA*, THE TRIBAL COURT PROPERLY EXERCISED JURISDICTION OVER PETITIONER

Prior to *Montana*, this Court held that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians *and non-Indians*." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978) (emphasis added); *see Williams v. Lee*, 358 U.S. 217, 223 (1959) (tribal-court civil jurisdiction over non-member was proper when non-member engaged in transactions with Indian on reservation; "[i]t is immaterial that respondent is not an Indian"). Against that backdrop, this Court has refused to extend the rule of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) — that tribes lack inherent criminal jurisdiction over non-members — to civil matters. *See, e.g., National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855 (1985).

*Montana* steered a different path from *Oliphant*, holding that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565.[22] That was so in

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[22] The political branches have long supported robust tribal sovereignty. *See* Elizabeth Ann Kronk, *Promoting Tribal Self-Determination in a Post-*Oliphant *World: An Alternative Road Map*, 54 Fed. Law. 41, 42 (Mar./Apr. 2007) ("Congress intended for tribal courts to develop their own systems, restrained by a minimum of civil rights, when it passed the Indian Civil Rights Act" and, since then, "the executive and legislative branches of the federal government" have continued to "support tribal self-determination" as "congressional legislation has consistently supported and articulated the policy of tribal self-determination").

two circumstances. First, "[a] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. Accordingly, both before and after *Montana*, it has been settled that "tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings." *Strate v. A-1 Contractors*, 520 U.S. 438, 449 (1997). Each of *Montana*'s exceptions independently sustains tribal-court jurisdiction here.

### A. *Montana*'s First Exception Controls Here

#### 1. Petitioner had a longstanding commercial relationship with tribal members regarding business on the Reservation

By "enter[ing] . . . agreements or dealings with" members of an Indian tribe, a non-member "subject[s] [himself] to tribal civil jurisdiction." *Montana*, 450 U.S. at 566.[23] As each of the four courts to apply this

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[23] Although this Court has not yet upheld tribal-court civil jurisdiction over a non-member defendant, *see Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001), that does not diminish the force of this Court's holdings that such jurisdiction exists. Such a conclusion follows necessarily from the Court's repeated refusal to hold that *Oliphant* governs in the civil context and from remands in *National Farmers* and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), which would have been unnecessary were there, as petitioner suggests, a *per se rule* against tribal-court civil jurisdiction over non-members.

exception in this case has held, the *Montana* first exception controls here.

**a.** The consensual-relationship exception applies to "private individuals who voluntarily submit[] themselves to tribal regulatory jurisdiction by the arrangements that they . . . enter[] into." *Hicks*, 533 U.S. at 372. The exception embodies the proposition that "[n]onmembers . . . who *choose* to affiliate with the Indians" through consensual commercial dealings "may anticipate tribal jurisdiction when their contracts affect the tribe or its members." *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1138 (9th Cir.) (en banc) (emphasis added), *cert denied*, 126 S. Ct. 2893 (2006).

This case fits squarely within that exception. Petitioner has had lengthy on-reservation commercial relationships with the Long Company — an Indian-owned entity — and with Long family members who are Tribe members. The Long Company, which operated on reservation fee and trust lands,[24] was formed for the sole purpose of qualifying for BIA-guaranteed loans, a fact that was set forth conspicu-

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[24] *All* land at issue here lies within a reservation whose boundaries are intact and hence is within "Indian Country." *See* 18 U.S.C. § 1151; *Solem v. Bartlett*, 465 U.S. 463 (1984) (holding that there has been no disestablishment of the CRST Reservation boundaries). Indeed, the damages from petitioner's breach of contract occurred exclusively on tribal *trust* land. *See supra* p. 12; 3d Aff. ¶ 17. And, contrary to petitioner's representations, on Kenneth Long's death, the other parcel became property of CRST *members*. *See supra* pp. 6-7. That land, under the loan agreement and the lease-with-option-to-purchase, was deeded to petitioner subject to petitioner performing under the loan agreement and subject to respondents' rights under the lease and option. Those facts have jurisdictional significance in applying *Montana*'s exceptions. *See Hicks*, 533 U.S. at 359.

ously in its Articles of Incorporation, *see* JA17, and shielded petitioner from virtually all financial risk. As petitioner explains, "[s]hortly" after incorporation "the Indian-owned Long Company . . . began lending relations with the Bank." Br. 4. *See also* 3d Aff. ¶ 8.

From 1989 until 1996, petitioner provided loans to the Long Company for its ranching and livestock operations on fee and trust land within the Reservation. As a condition for annual business operating loans that covered the purchase and management of cattle on tribal trust land, petitioner *required* the Tribe-member Longs personally to obtain guarantees from the BIA, guarantees to which they were entitled because of their good credit standing and their tribal status. *See supra* pp. 5-6; 3d Aff. ¶¶ 4, 11.[25] Petitioner's applications to the BIA showed that it was lending to a qualifying Indian-owned business entity. *See* 25 C.F.R. § 103.9. And petitioner received interest-subsidy payments on these loans from the BIA. *See* JA81-85. As petitioner stated in its 1997 letter to the North and South Dakota *Indian* Business Development Center, these BIA "credits

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[25] Petitioner also provided personal loans to tribal member owners of the Long Company. *See* 3d Aff. ¶ 2. Petitioner's extensive and personal on-reservation interactions with the Longs included sending bank representatives to the Reservation and engaging in day-to-day supervision of the Long Company's financial activities. *See supra* p. 6. Negotiations over the loan agreements and debt repayment took place in tribal offices on trust land and were facilitated by BIA employees and tribal officers. *See* 2d Aff. at 4. At bottom, petitioner was aware its dealings with respondents would subject it to tribal-court jurisdiction, as evidenced by its reference to "jurisdictional problems" it would face in informing the Longs that it was withdrawing its offer to finance the Longs' repurchase of their land from petitioner. *See id.* at 5.

and loans would not have been possible without your expertise and assistance." JA116.

In short, petitioner purposefully and continuously availed itself of doing substantial business with an Indian-owned company whose "principal place of business . . . was at all times located on the CRST Reservation," 2d Aff. at 3, and which ran its cattle ranching operations primarily on tribal trust land that petitioner's officers periodically inspected. *Cf. Strate*, 520 U.S. at 446 (*Montana* recognized tribes retain power to regulate "nonmember[]" conduct on "land . . . held in trust for the Tribe"). Throughout its course of dealings with the Long Company, petitioner provided personal loans to enrolled tribal members who at various times owned land within the Reservation, relied on tribal officials to facilitate commercial interactions, and visited the Reservation multiple times. *See supra* p. 8. Perhaps most importantly, petitioner's knowledge from the inception that it was dealing with an Indian-owned company and the benefits that entailed (BIA loan guarantees) formed the very *foundation* of the parties' commercial relationship. Despite all of that, petitioner elected not to include a single forum-selection, arbitration, or choice-of-law clause in any of the commercial agreements it drafted.[26]

In these circumstances, petitioner's claim of unfairness or surprise in being subject to tribal-court jurisdiction rings especially hollow. As this Court has held in an analogous context, "[w]here a forum seeks to assert specific jurisdiction over an out-of-

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[26] A tribal entity cannot insist on exhaustion of tribal remedies by entering into an agreement with a forum-selection clause. *See, e.g., FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995).

state defendant who has not consented to suit there, th[e] 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citation and footnote omitted). Just as an out-of-state defendant can functionally consent to the burdens of jurisdiction in an unfamiliar forum through purposeful availment, *Montana*'s first exception provides that a non-member can consent to tribal-court civil jurisdiction through "commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. The record establishes that petitioner has done just that.

Indeed, this case fits comfortably within the model of consensual relations described in the cases supporting *Montana*'s first exception. *See Strate*, 520 U.S. at 457 ("*Montana*'s list of cases fitting within the first exception indicates the type of activities the Court had in mind") (citation omitted). In particular, in *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904), this Court upheld the authority of a tribe to impose a tax on non-member-owned livestock within the boundaries of a reservation. Similarly, in *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), the court upheld a tax imposed by a tribe on non-members for the privilege of doing business on a reservation with tribal members. As the Eighth Circuit here held, the exercise of tribal-court authority did nothing more or less than impose a "standard of fairness" on non-members "when they voluntarily deal with tribal members" on the reservation. Pet. App. A13.[27] If

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[27] This case is thus nothing like *Strate*, with two non-Indians involved in an ordinary traffic accident, where the "Tribes were

tribes can tax non-members as a price of doing business with tribal members, it follows *a fortiori* that tribes can enforce basic standards of fair dealing.

**b.** "*Montana's* consensual relationship exception [also] requires that the . . . regulation imposed . . . have a nexus to the consensual relationship itself." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). The record here also supports that standard.

All of the claims against petitioner arose out of petitioner's commercial dealings with respondents and were directly tied to the loan agreement and the lease-with-option-to-purchase. Importantly, petitioner does *not* challenge tribal-court jurisdiction over respondents' breach-of-contract and bad-faith claims. But respondents' discrimination claim also arises out of the same commercial agreements that underlie those claims. *See supra* p. 8. For that reason, the exercise of tribal-court jurisdiction with respect to respondents' discrimination claim was anything but "in for a penny, in for a Pound." *Atkinson*, 532 U.S. at 656 (internal quotations omitted). Rather, there is a close and logical nexus between the discrimination claim — founded on petitioner's predatory lending practices — and the underlying commercial relations.

**c.** Independently, petitioner's litigation actions establish consent to tribal-court jurisdiction. Although this Court has said that *Montana*'s principles "pertain[] to subject-matter, rather than merely personal, jurisdiction," *Hicks*, 533 U.S. at 367 n.8, the Court

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strangers to the accident." 520 U.S. at 457 (internal quotations and brackets omitted). Here, the consensual commercial relations of petitioner with an Indian-owned company and tribal members were longstanding, and those relationships underlie directly respondents' claims in Tribal Court.

also has established that tribal courts are courts of limited jurisdiction only to the extent that federal law limits their jurisdiction. *Montana* makes clear that federal law does not deprive tribal courts of their jurisdiction over a non-member when the non-member consents to tribal authority. *Compare People's Bank v. Calhoun*, 102 U.S. 256, 260-61 (1880) ("[M]ere consent of parties cannot confer upon [an Article III] court of the United States the jurisdiction to hear and decide a case.").

Viewed in that light, petitioner waived or forfeited through its litigation conduct any objection to tribal-court jurisdiction. First, it was petitioner that "originally sought relief through the assistance of the CRST courts" in serving the Notice to Quit, thus availing itself of tribal process. Pet. App. A39; *see also* JA146 (submitting Notice to Quit to "Mr. Charging Cloud" of the "[CRST] Court"). Petitioner erroneously contends that it had no choice but to use tribal courts to effectuate service because "[o]ff-reservation process servers cannot effectuate valid service on the Reservation." Br. 8. In fact, petitioner could have served the Long Company's state-required agent for service of process (the Longs) in Indian Country as provided under state statutes that permit such service, or the Longs whenever they left the Reservation. *See Bradley*, 587 N.W.2d at 594-95; *supra* p. 13. By availing itself of the benefits of CRST process, petitioner consented to tribal-court jurisdiction. *Cf. Salish Kootenai College*, 434 F.3d at 1138, 1140 ("nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a 'consensual relationship' with the tribe within the meaning of *Montana*"); Pet. App. A39 (finding it

"significant" that petitioner "sought relief through the assistance of the CRST courts").

Second, following service of the Notice to Quit, petitioner brought a state-court action against respondents. *See supra* pp. 17-18. Petitioner, however, never prosecuted that state-court litigation, choosing instead to defend itself and litigate its counterclaims in tribal court. Petitioner consented to the dismissal of its state-court action in 2004. *See supra* pp. 18-19. That course of events suggests that petitioner *elected* to pursue its remedies in tribal court Having lost in tribal court when it chose to be there, petitioner should not now be allowed to complain that it should not have been there after all.

Third, petitioner consented to tribal-court jurisdiction in moving for summary judgment on its counterclaim. In its motion, petitioner averred that "[t]he Court has jurisdiction over [the Long Company] and Ronnie Long and Lila Long . . . , enrolled members of the [CRST] and *the Court has jurisdiction over the subject matter of this action.*" JA187-88 (emphasis added). This was, as the district court found, a "significant concession . . . and [petitioner] should be held to it." Pet. App. A40.[28] *Cf. Petrowski v. Hawkeye-Security Ins. Co.*, 350 U.S. 495, 495-96

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[28] The factual determinations made by the district court and the court of appeals regarding consent, *see* Pet. App. A40 (finding petitioner's concession regarding jurisdiction was "significant"); *id.* at A5 (finding petitioner "conceded that the tribal court had jurisdiction"), should control here. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not lightly overturn the concurrent findings of the two lower courts.") (internal quotations omitted).

(1956) (per curiam) (upholding personal jurisdiction based on a stipulation entered by defendant).

### 2. Petitioner's Arguments Regarding *Montana*'s First Exception Are Unavailing

In response, petitioner first advances the remarkable suggestion that the *Montana* exceptions are inapposite because a tribe may not "extend[] its authority over non-Indian land." Br. 15. Thus, according to petitioner, this Court "need not determine whether either [*Montana*] exception applies, because the land at issue is non-Indian-owned fee land." Br. 21.[29] That statement is wrong factually and legally. As a factual matter, petitioner's liability to respondents arises directly out of petitioner's failure to pay to respondents loans promised for cattle-raising on tribal trust land. *See supra* p. 12. In addition, the fee land at issue in the lease-repurchase agreement belonged to a tribal member — Ronnie Long — at least when petitioner used the probate-court proceedings ostensibly to obtain title from the personal representative. *See supra* pp. 7-9.

Petitioner's argument is wrong as a legal matter as well. Even if the land at issue were not tribal trust land or Tribe-member-owned fee land, all of the land at issue here is within a reservation whose boundaries are intact. *See supra* note 24. The *Montana* framework was adopted to address precisely such situations. *See* 450 U.S. at 557-67.[30] Petitioner's

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[29] Petitioner's brief is full of such overreaching misstatements. *See, e.g.*, Br. 20 ("Nonmembers' ownership of land on an Indian reservation operates to divest the tribe of any sovereignty over that land.").

[30] Petitioner also mistakenly claims (at 23) that *Bourland* supports the view that tribes lack any jurisdiction over non-Indian fee land within a reservation. *Bourland* decided whether

notion that *Montana* is inapplicable because, on petitioner's misstated view of the facts, non-Indian land was at issue finds no support in this Court's precedent.

To the extent petitioner advocates abandoning *Montana*, thus eliminating any inherent tribal authority over non-members on all lands within reservations, that position radically departs from decades of precedent. Starting with *Montana*, this Court has consistently rejected calls to extend the rule of *Oliphant* to civil jurisdiction. *See, e.g., Hicks*, 533 U.S. at 391 (O'Connor, J., concurring in part and concurring in the judgment) (*Montana* "occup[ies] a middle ground between . . . cases that provide for nearly absolute tribal sovereignty over tribe members" and "rule that tribes have no inherent criminal jurisdiction over nonmembers"). In *National Farmers*, this Court held expressly that "the reasoning of *Oliphant does not apply*" to civil adjudicatory authority. 471 U.S. at 854 (emphasis added). "[W]hether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians . . . is not automatically foreclosed." *Id.* at 855. Rather, such an

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the federal government's taking certain land within the CRST Reservation for a federal flood-control project abrogated tribal treaty rights to regulate hunting and fishing of non-members on that land, holding that "Congress gave the Army Corps of Engineers, not the Tribe, regulatory control over the taken area." 508 U.S. at 691. The Court explained, however, that "[t]he *question remains* . . . whether the Tribe may invoke other potential sources of tribal jurisdiction *over non-Indians* on these lands" under *Montana*. *Id.* at 695 (emphases added). The Court thus expressly left "to be resolved on remand" whether the tribe had authority under the *Montana* exceptions. *See id.* at 695-96. Accordingly, petitioner could not be more wrong in suggesting (at 23) that "*Bourland* controls here."

inquiry requires an extensive legal and factual analysis. *See id.*[31]

Read together, *Montana* and *National Farmers* stand for the propositions that there is no categorical bar to the exercise of tribal *civil* authority over non-members and that tribes retain some inherent civil authority over non-members in connection with non-Indian fee land within a reservation. Nothing has changed since those decisions that would warrant this Court to depart from those rules.[32]

Second, petitioner's argument (at 31) that the Long Company is not a "tribal member" within the meaning of *Montana*'s first exception and thus that the exception is inapposite also is unfounded. First, the only cause of action petitioner now challenges concerns discrimination against only Ronnie and Lila Long, both of whom are tribal members. *See* JA191 (Special Interrogatory Form to Jury). The jury was not asked to find — and it did not find — discrimination against the Long Company. *See id.* Second, in any event, petitioner has known from the inception of its lengthy relationship with respondents that it was

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[31] In *National Farmers*, the Court made specific findings about the difference between civil and criminal jurisdiction, *see* 471 U.S. at 854-55, findings that are controlling here.

[32] *See Randall v. Sorrell*, 126 S. Ct. 2479, 2489 (2006) ("[t]he Court has often recognized the 'fundamental importance' of *stare decisis*"; "the rule of law demands that adhering to our prior case law be the norm" such that "[d]eparture from precedent is exceptional, and requires 'special justification'") (opinion of Breyer, J.); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.").

dealing with an Indian-owned corporation, a fact set forth in the company's Articles of Incorporation, *see* JA17, and crucial to every loan guarantee petitioner insisted the BIA provide, *see supra* pp. 5-6. Indeed, petitioner benefited substantially from and engaged in transactions with respondents only because of BIA guarantees. Beyond that, petitioner has had substantial consensual dealings with the Longs personally, including demanding personal guarantees and regular oversight of the Longs' daily operations of the family business. *See supra* p. 6; 1st Aff. ¶ 10; 2d Aff. at 4 (Ronnie, Lila, Kenneth, and Maxine "were all required by [petitioner] to grant security interests to [petitioner] in their personal vehicles, farm equipment, crops, feed, grain, and livestock").

Importantly, moreover, the South Dakota Supreme Court has *rejected* petitioner's view that incorporation under the laws of its state precludes classifying an entity as a tribal member. *See Pourier v. South Dakota Dep't of Revenue*, 658 N.W.2d 395, 404 (2003) ("corporation owned by . . . an enrolled tribal member residing on the Indian reservation and doing business on the reservation for the benefit of reservation Indians is an enrolled member"), *vacated in part on other grounds on partial reh'g*, 674 N.W.2d 314 (S.D. 2004). The South Dakota Supreme Court, in fact, relied on Congress's BIA program as illustrative of the principle "that the identity of those owning and operating a business is pertinent to classification of the entity" in the context of federal Indian law. *Id.* at 404-05.

Although petitioner boldly asserts that "there is no merit to the idea that . . . [petitioner] availed itself of the advantages of doing business with a member [of the Tribe]," Br. 33, that claim strains credulity.

Petitioner entered into numerous longstanding consensual relations (taking the form of commercial dealings, contracts, and leases) with an Indian-owned company and tribal members, engaged in repeated transactions with the BIA to take advantage of that status, and dealt repeatedly with the company on member-owned fee land and tribal trust land within a reservation. Indeed, including the land valued at approximately $468,000 that it took from respondents, petitioner profited in excess of $1 million through BIA payments of $392,968 (JA135-37 (Pls. Ex. 16)), $88,396 in federal CRP payments, $100,000 from Kenneth Long's life insurance, plus BIA interest-subsidy payments (JA81-83), federal crop-subsidy payments, and land sales to non-Indians in this case. In view of the "fundamental precept of Anglo-American jurisprudence that you cannot have your cake and eat it, too," *I.T. Consultants, Inc. v. Islamist Republic of Pakistan*, 351 F.3d 1184, 1191 (D.C. Cir. 2003) (Roberts, J.), petitioner cannot profit from respondents' known Indian status and then claim surprise or unfairness regarding that status.

Third, petitioner contends the first *Montana* exception is inapplicable because tort law is not an "other means" of regulation. *See* Br. 35-39. This argument, which rests on the premise that regulatory authority can exceed adjudicatory authority, finds no support in this Court's precedent and cannot be squared with the purpose of the first *Montana* exception.

This Court's decisions establish that *adjudication* over non-Indians is part and parcel of a tribe's civil authority. In *Montana*, for example, in support of the consensual-relationships exception, this Court cited *Williams v. Lee*, which held that, as a corollary

of "the right of the Indians to govern themselves," "tribal courts" had adjudicatory jurisdiction over a non-Indian. 358 U.S. at 223. Furthermore, in both *National Farmers* and *Iowa Mutual*, this Court addressed challenges to a tribe's authority to adjudicate common-law claims over non-members and remanded for a law- and fact-intensive inquiry into whether that exercise of jurisdiction was proper. *See* 471 U.S. at 856-57; 480 U.S. at 19-20.[33]

In other contexts, the Court has rejected petitioner's assertion (at 38) that "regulation is effectuated through legislative enactment, not adjudication." This Court has recognized that common-law tort claims represent a form of regulation. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (tort claims "can be, indeed [are] designed to be, . . . potent method[s] of governing conduct and controlling policy"); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008). There is no principled reason that this rule — which reflects that regulatory control may be exercised by legislative *and* judicial means — applies everywhere but Indian Country.

Even if there were a logical way to disaggregate regulatory and adjudicatory authority in Indian Country, it would be unwarranted in the context of the first *Montana* exception: if a tribe can regulate non-members who enter consensual relationships with tribal members, a tribe also should be able to

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[33] *See Brendale v. Confederated Tribes*, 492 U.S. 408, 430 (1989) (opinion of White, J.) (referring to tribal adjudication as a means of "regulat[ing]" non-members); *see also Salish Kootenai College*, 434 F.3d at 1140 ("[t]he Tribes' system of tort is an important means by which [they] regulate . . . domestic and commercial relations").

give meaning to those rules via adjudication. *Cf. Morris*, 194 U.S. at 393. This Court recognized as much in *Strate*, reading its precedent to "stand[] for nothing more than the *unremarkable proposition* that, where tribes possess authority to *regulate* the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the *tribal courts*." 520 U.S. at 453 (internal quotations and brackets omitted, emphases added). Indeed, the first exception embodies the principle that a non-Indian can *consent* (through word and deed) to tribal civil authority. *Cf. Penn v. United States*, 335 F.3d 786, 790 (8th Cir. 2003) ("A tribe's civil jurisdiction over nonmembers . . . is broadest with respect to nonmembers who voluntarily involve themselves with tribal activities."). It would be anomalous to suppose that, while a non-member may consent to tribal civil *regulatory* authority, it cannot also consent to civil *adjudicatory* authority.

### B. The Second *Montana* Exception Also Supports Tribal-Court Jurisdiction

*Montana* also confirmed a tribe's inherent power "to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. Petitioner's conduct in this case — predatory and discriminatory lending practices during a multi-year commercial relationship characterized by intrusive micromanagement of their financial affairs and relating to business activities on tribal trust lands — is

precisely the sort of conduct that threatens to imperil tribal economic security.[34]

To be sure, the second *Montana* exception has been construed narrowly to reach only those cases where "the impact of the nonmember's conduct '[is] demonstrably serious'" and "'imperil[s] the political integrity, the economic security, or the health and welfare of the tribe.'" *Atkinson*, 532 U.S. at 659 (quoting *Brendale*, 492 U.S. at 431 (opinion of White, J.)). The second exception's narrowness, however, does not obviate its existence entirely. *Montana* makes clear, and this Court's subsequent cases reaffirm, that some behavior by non-members on non-Indian fee land might be so egregious, so extensive, or so extraordinary as to threaten the very integrity of the tribe's political system, the security of its economy, or the health and welfare of its members.

Thus, in *Montana*, the Court suggested that the tribe *would* have the power to regulate hunting and fishing on non-Indian fee land if there were credible evidence that the hunting and fishing on such land imperiled the subsistence or welfare of the tribe. *See* 450 U.S. at 566. And, in *Brendale*, with respect to the fee lands in closed areas, where the district court had found that the proposed use would "undoubtedly negatively affect the general health and welfare of the Yakima Nation and its members," the Court

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[34] Because this case fits squarely into the first *Montana* exception, neither the district court nor the court of appeals addressed application of the second exception. If this Court concludes the first exception is inapposite, it may wish to remand the matter for resolution of the issue by the lower courts in the first instance. *See, e.g.*, *Bourland*, 508 U.S. at 695-96. *But see Atkinson*, 532 U.S. at 657-59 (resolving application of second exception even though court of appeals did not reach issue).

upheld the power of the tribe to impose zoning restrictions under the second *Montana* exception. 492 U.S. at 443-44 (opinion of Stevens, J.).

Petitioner's conduct fits squarely within the narrow category of conduct that threatens to imperil the Tribe's economic security and its members' welfare. Petitioner engaged in a sustained campaign of aggressive, predatory, and ultimately discriminatory lending practices with tribal members and a member-owned corporation. *See supra* pp. 3-12. The tortious behavior was directly related to land held in trust by the Tribe to support the ranching economy that is crucial to its members' health and welfare and the continuing economic vitality of the Tribe. *Cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) ("[T]he Tribe's authority to tax non-Indians who conduct business on the reservation . . . is an inherent power necessary to tribal self-government and territorial management."). Indeed, the Tribe's support of this ranching economy is precisely the sort of comprehensive interest in an area of tribal culture and economy that formed the basis of tribal zoning jurisdiction over closed reservation lands in *Brendale*. *See* 492 U.S. at 438-42 (opinion of Stevens, J.).

The destruction of respondents' ranching business as a result of petitioner's tortious behavior directly implicated tribal interests. Most directly, this behavior imperiled the lease payments that the Longs owed to the Tribe for their use of the Tribal Grazing Unit. More generally, because petitioner has been deeply engaged in the economy of the Tribe by virtue of its extensive lending arrangements in connection with member ranching activity, its inclination to engage in aggressive and predatory behavior threatens the foundation of the Tribe's ranching economy and

the health and welfare of its members. Given the centrality of member ranching activity to the economic stability of the Tribe, catastrophic livestock losses such as those suffered by the Longs and fellow Tribe members in the winter of 1996-1997 had a profound impact on the well-being of the Tribe. *See* Robert Dvorchak, *South Dakota cattle perish in cold*, Pittsburgh Post-Gazette, Mar. 2, 1997, at A12.

In addition, petitioner's predatory lending practices adversely affected the comprehensive BIA guaranteed loan program as it operates on the CRST Reservation, the existence of which underlies the economic security of the Tribe and demonstrates Congress's view that fair and accessible mortgage lending is essential to tribal economies. Congress enacted the federal BIA-subsidized mortgage lending program "to provide Indian tribes and individuals capital in the form of loans and grants to promote economic and other development." H.R. Rep. No. 93-907, at 6 (1974). Congress recognized that private money markets are "practically closed to . . . Indian tribes and individuals [because they] have been categorized as poor credit risks in the private market for reasons often beyond their control." *Id.* at 7. That lack of access to the credit markets without the BIA program makes "private credit, if available at all, . . . only available at interest rates so high as to be prohibitive." *Id.* The program is meant to be mutually beneficial to Indians and lenders alike by encouraging "eligible borrowers to develop viable Indian businesses through conventional lender financing . . . that might otherwise be unavailable" (25 C.F.R. § 103.2) and thereby provide Indians with financing sources to sustain and grow economic development on reservations. Such actions promote the tribe's overall

economic security and welfare by reducing lenders' excessive risks on their loans. *See id.*

## CONCLUSION

The judgment of the court of appeals should be affirmed.

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March 12, 2008

# REPLY BRIEF

(17)

No. 07-411 4-4-08

In The
# Supreme Court of the United States

PLAINS COMMERCE BANK,

*Petitioner,*

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG, LILA LONG,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITIONER PLAINS COMMERCE BANK'S REPLY BRIEF


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## LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eighth Circuit.

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or publicly held company owning 10% or more of its stock.

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## INTRODUCTION

Plains Commerce Bank has standing both because it was a defendant in Tribal Court and because the jury's undifferentiated damages award was based in part on discrimination liability. The Tribal Court lacked jurisdiction to adjudicate the Longs' discrimination claim as an "other means" of regulating the Bank's conduct with respect to land the Bank owned on the Reservation that it leased to the Long Company. The Bank did not have a consensual relationship with the Tribe or its members that would support tribal regulation.

The power to adjudicate disputes between members and nonmembers, with limited exceptions inapplicable here, does not lie with tribal courts because of the dependent domestic status of the tribes themselves. *Montana*'s consensual-relationship exception did not directly address nonmember-defendant adjudicatory jurisdiction. *Montana v. United States*, 540 U.S. 544 (1980). *Williams* speaks only to nonmember-plaintiff jurisdiction. *Williams v. Lee*, 358 U.S. 217 (1959).

Nonmember defendants are uniquely vulnerable in tribal court. They have no ability to participate in tribal government or tribal law. Tribal common law is frequently unavailable to them. Because federal courts do not undertake a substantive review of the underlying merits, tribal courts have the final word on fairness and justice for nonmembers. In the tribes' struggle for the power to assert adjudicatory

jurisdiction of nonmembers like the Bank, the Court must be mindful not to overlook the Bank's rights, and that sovereignty derives from the consent of the governed. *See Duro v. Reina*, 495 U.S. 676, 694 (1990), *superseded by statute on other grounds*, 105 Stat. 646 (1990).

The Bank had a contractual relationship with a South Dakota corporation, closely held by tribal members. The Longs' corporate-form choice protected them from personal liability. This choice has consequences. It is inconsistent for the Long Company to be a corporation for limited-liability purposes and a tribal member for jurisdictional purposes. That would make the existing jurisdictional maze a morass of unpredictability.

The Bank's contractual relationship with the Long Company did not provide the Tribal Court with civil-adjudicatory jurisdiction over the Longs' discrimination claim. The Bank owned the land underlying the lease. There was no relationship between the Bank and the Longs that would support tribal regulation. Even assuming the contrary, the relationship that existed would not support civil adjudication. And even if it could, regulation through civil adjudication of a tort claim against a nonmember should be impossible. Torts are nonconsensual.

Tribes do not possess sovereignty comparable to that of a foreign country; they are not an equal partner in the scheme of federalism. This Court can review federal court decisions. Courts in the state

system are both potentially subject to review by this Court and operate subject to a qualified right of removal to federal courts.

The tribal-court system, however, is separate and unique. It is wholly distinct from traditional courts of general jurisdiction. Other than jurisdictional questions, federal courts provide no substantive review of tribal-court proceedings. The tribal-court system lacks adequate structural protections against abridging nonmember defendants' constitutional rights.

For that reason, tribal courts' power to adjudicate members' claims against nonmembers should be constrained. This Court should deny tribal courts broad jurisdiction over nonmember defendants who stand outside members' political relationships to their tribes. Nonmember defendants should not be exposed to proceedings in tribal courts under *Montana*'s consensual-relationship exception without their actual acceptance of the tribe's jurisdiction to resolve a particular claim. This is the heart of the consensual-relationship exception. And there can be no question that the Bank did not voluntarily submit to tribal jurisdiction to adjudicate the Longs' discrimination claim.

## I. THE LONGS' FACTUAL RECHARACTERIZATION IS IRRELEVANT TO RESOLVING THE QUESTION PRESENTED.

### A. This Court Should Disregard the Longs' Attempts to Insert Facts From Outside the Federal-Court Record.

Throughout the Longs' brief, they improperly reach beyond the certified record to present facts and arguments not made to federal courts below. Inexplicably, and without seeking leave to do so, the Longs now rely on documents and testimony from the Tribal Court record not presented to the Federal District Court, and documents from other courts and proceedings that are irrelevant to this case. They do so generally, usually without notation, and without attaching cited documents in an addendum to their brief. Supreme Court Rule 32.3 provides a procedure for explicitly requesting consideration of non-record material, which they have chosen to ignore.

This Court should not consider items that do not appear in the certified record when determining the question presented. *Lawn v. United States*, 355 U.S. 339, 354-355 (1958) (citations omitted). Therefore, the Court should disregard all citations to non-record facts and the arguments stemming therefrom. *See, i.e.*, Resp. Br. at 1, 6-10, 17-19, 30-32.

To answer the question presented, this Court need only consider a handful of undisputed jurisdictional facts. The Bank owned the 2,230 acres of land at issue by virtue of a personal representative's deed.

JA 113-15. It entered two contracts with the Long Company: a lease with an option to purchase, and a separate loan agreement. JA 96-106. The Longs signed these contracts in their capacities as company officers. JA 101, 106. Despite the tribal identity of its owners at the time of the contracts, the Long Company is not an "Indian" and is not a member of the Tribe. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977).

The BIA's involvement is immaterial to the jurisdictional analysis. The Long Company was structured with at least 51% member ownership to facilitate the BIA's loan guarantees. And the Bank's contemplated loans to the Long Company were loans the Bank would not have made without BIA guarantees.

But Congress, while providing for BIA guaranteed lending, has not authorized tribal-court adjudicatory jurisdiction over nonmember defendants for disputes arising out of BIA guaranteed loans. Congress's silence on this point strengthens the conclusion that the Tribal Court lacked jurisdiction over the Bank. It makes no sense to suggest that, simply by establishing a program designed to facilitate nonmember loans to tribes, their members, and Indian-owned entities, Congress actually intended to place a thumb on the jurisdictional scale.

### B. The Longs Make Significant Factual Misstatements.

Although there are many misstatements and mischaracterizations in the Longs' brief, the Bank draws the Court's attention only to the most relevant and egregious issues: the Longs' inaccurate characterization of the contracts, the procedural history of this case in Tribal Court, and their contention that the Bank waived its jurisdictional challenge to the discrimination claim.

The Longs characterize the Bank's conduct as "predatory lending." Resp. Br. at 1. Although the merits of the underlying dispute are not before this Court, the Bank cannot let that stand without comment. It worked with the Longs to find a solution to their problem of not having enough money to run their business. When Kenneth Long died, the Long Company's debts greatly exceeded its assets. Entering into a new relationship with the Long Company, the Bank as the fee owner of the land attempted to keep the Longs' ranching operation running. This was a business-loan workout.

The Longs' brief misstates the terms and conditions of the loan agreement. They ignore the fact that the requirement of a BIA guaranty increase was a condition precedent to the loans. Compare Resp. Br. at 10 with JA 104-06. The Longs claim that the Bank "agreed to make a $70,000 loan to the Long Company," and "agreed to make a $37,500 loan to the Long Company." JA 105. Under the terms of the

agreement, however, the Bank was required to "request a 90% BIA guaranty on a $70,000.00 annual operating loan," and "[i]f the BIA guaranty requests are approved, then the Bank of Hoven will make a loan to Long Family Land and Cattle Co. Inc. for . . . $37,500." *Id.*

The Longs also incorrectly assert that the Bank initiated the action in Tribal Court. Resp. Br. at 13. It never appeared as a plaintiff in Tribal Court. Although the Longs argue that the Bank could have served the Long Company's registered agent, they fail to acknowledge that its agent is Ronnie Long, who resided on the Reservation. JA 16.

South Dakota law prohibits service by state officials or private process servers on an enrolled Indian or resident on reservation lands. *See Bradley v. Deloria*, 587 N.W.2d 591, 593 (S.D. 1998) (interpreting S.D. Codified Laws § 15-6-4(c)); *Annis v. Dewey County Bank*, 335 F. Supp. 133, 136 (D.S.D. 1971). As such, the Bank sought help from the Tribal Court to properly serve the Long Company's registered agent with respect to a state court proceeding, but never filed suit against the Longs or the Long Company in Tribal Court. JA 146-47.

The Longs further contend that the Bank waived its jurisdictional challenge to the discrimination claim. Resp. Br. at 14-15. The Bank has challenged tribal-court jurisdiction over the tort claim at every stage of this proceeding. JA 181; A-1-2, A-32, A-49. Although the Bank asserted jurisdiction in its counterclaim

seeking eviction from the leased property, that claim was pled in the alternative should the Tribal Court find, as it did, that it had jurisdiction over the Bank's objection. This was not consent to tribal-court jurisdiction generally. JA 184.

In the context of its summary-judgment motion on its counterclaim, the Bank stated that the Tribal Court had jurisdiction. JA 187-88. That was not a concession that the Tribal Court had jurisdiction over the Longs' and Long Company's claims against the Bank. The Tribal Court had already denied the Bank's motion to dismiss for lack of jurisdiction. A-48. The Bank therefore pursued its alternative counterclaim. The Bank's statement will not bear the broad, after-the-fact interpretation the Longs attempt to imbue it with. The Bank reiterated its jurisdictional objection to the discrimination claim before the jury trial (A-5), after trial (A-79-80), and on appeal to the Tribal Court of Appeals (A-49-50).

Subject-matter jurisdiction may not be waived nor consented to by the parties. *Gosa v. Mayden*, 413 U.S. 665, 707 (1973). It either exists or it does not, as a matter of law. Therefore, the Longs' assertion that the Bank consented to or waived its jurisdictional challenge to their discrimination claim is without merit. The Tribal Court lacked subject-matter jurisdiction.

## II. THE BANK HAS STANDING BECAUSE IT WAS A DEFENDANT IN TRIBAL COURT AND THE LONGS WON THEIR DISCRIMINATION CLAIM THERE.

The Longs' freshly coined standing argument is a tortured distraction. They allege the Bank lacks standing because it has not been injured. They base this remarkable conclusion in a labyrinthine analysis that ultimately rests on the premise that the Bank won the discrimination claim without anyone – including the jury – noticing. It is telling that they discovered such a core jurisdictional defect after years of litigation before two tribal courts, two lower federal courts, and the grant of certiorari by this Court. The record compels the conclusion that the Longs' standing argument is without merit.

"The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance." *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004). In order to establish Article III standing, the plaintiff must have suffered an "injury in fact" that is actual, concrete and "fairly trace[able] to the challenged action," and there must be a "substantial likelihood that the requested relief will remedy the alleged injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

Federal law provides nonmember defendants recourse to challenge tribal-court jurisdiction in federal court. *See* 28 U.S.C. § 1331; *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850-853

(1985) (challenging tribal-court jurisdiction over a non-Indian in federal court presents a question "arising under" federal law). In this action, the Bank challenged the Tribal Court's improper assertion of subject-matter jurisdiction over a tort claim brought by members against a nonmember.

Asking whether the Bank prevailed on the underlying merits in Tribal Court misses the mark. This case does not turn on whether the Bank was successful in Tribal Court. The Bank's actual and concrete injury was the Tribal Court's improper exercise of jurisdiction, and the precedent established when it ultimately entered judgment on the merits that the Bank had engaged in abhorrent racial discrimination. This injury is the direct result of the Longs' suit being improperly brought in Tribal Court. A favorable outcome in this Court will remedy the Bank's injury.

The Longs nevertheless contend that a favorable outcome for the Bank would not matter because there are other grounds for sustaining the Tribal Court jury's damages verdict. That is not true. There was a final judgment in Tribal Court. The Bank appealed to the Tribal Court of Appeals. The Longs could have addressed any perceived deficiency in the judgment that they chose to. But they did not do so. They did choose, however, to submit the case to the jury for a general verdict – one that did not allocate or differentiate its damage award. If there was no jurisdiction over the discrimination claim, then the Tribal Court judgment is, quite simply, a nullity.

The Longs are also incorrect that the Bank prevailed on the discrimination claim in Tribal Court. They argue that they neither requested nor received monetary damages for the discrimination claim and, thus, the Bank has suffered no redressable injury. Resp. Br. at 28-31. This argument, however, cannot be reconciled with the record. It ignores special interrogatory 6 of the jury verdict form, the jury's finding that the Bank had discriminated against the Longs (JA 191), and their explicit prayer for relief requesting "such other and further relief as is just and equitable under these circumstances." JA 179.

The jury returned a general verdict of $750,000 in damages with special interrogatories finding the Bank had breached its contracts with the Company and discriminated against the Longs. JA 190-92. The jury did not differentiate its lump-sum damages award. JA 192. The Longs presented an exhibit at trial stating their contract damages to be more than a million dollars. JA 197-200. In awarding a lesser amount, but premising it on additional claims, the jury made some compromise – the precise nature of which is now unknowable.

As instructed, the jury predicated its damages verdict on its liability findings. JA 191. Nothing in the Tribal Court's supplemental judgment changed that fact. The Longs now attempt to impose their own speculative interpretation on the damage award. Resp. Br. 32-35. This Court should not accept the invitation to join in this exercise.

The Bank was improperly haled into Tribal Court and forced to defend itself there. The tribal jury held the Bank liable for discrimination. A ruling by this Court that the Tribal Court lacked subject-matter jurisdiction will require *vacatur* of the Tribal Court judgment, and will redress those wrongs. The Bank has suffered an injury in fact from the Tribal Court proceedings that can be redressed by a favorable federal court judgment.

## III. THE LONGS PROVIDE NO COMPELLING REASON FOR THIS COURT TO DISREGARD *MONTANA*'S GENERAL RULE THAT TRIBES LACK JURISDICTION OVER NONMEMBERS.

The Bank does not seek to upset this Court's established framework for determining jurisdiction over nonmembers established in *Montana*. It does, however, seek clarification of how that framework applies to it as a nonmember defendant. *Montana*'s general rule controls here, rather than its exceptions.

The Bank did not consent to tribal regulation under *Montana*'s consensual-relationship exception, and the Tribal Court lacked civil-adjudicatory jurisdiction over the nonmember Bank under the second exception. The commercial lending agreements between the Bank and the Long Company do not, as a matter of law, directly affect the Tribe's ability to govern itself or control the internal relations of its members – the only circumstances this Court has

suggested would support the notion that tribal courts may exercise civil-adjudicatory jurisdiction over nonmember defendants.

The Longs' request for this Court to find tribal-court civil-adjudicatory jurisdiction over a dispute involving a nonmember defendant is at odds with *Montana*'s general rule and well beyond the narrow scope of its two exceptions. Affirming the Eighth Circuit's decision would find for the first time that a tribal court had civil-adjudicatory jurisdiction over a nonmember, non-consenting defendant – a result with significant and far-reaching consequences. *See Nevada v. Hicks*, 533 U.S. 353, 358 n.2. (2001).

It is not this Court's responsibility to delegate that power to tribes. Congress presumably could pass legislation to broadly delegate adjudicatory jurisdiction over nonmember defendants to tribal courts. As the National Network to End Domestic Violence's brief shows, Congress has sometimes provided for specific grants of tribal-court adjudicatory jurisdiction over nonmember defendants. *See* 18 U.S.C. § 2265(e). But because Congress has not granted the broader jurisdictional authority here, the inescapable conclusion is that the tribes lack such power. Just as this Court declined as a categorical matter in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), to find such power as to criminal proceedings involving non-Indians, it should be reluctant to expose nonmembers to tribal-court jurisdiction on the basis of consent when such consent has never actually been given – as is unquestionably the situation here.

### A. The Bank's Ownership of the Leased Land Weighs Strongly Against Exercise of Retained Inherent Tribal Authority.

*Montana* suggests a tribe may regulate nonmember consensual relationships even on nonmember fee land within a reservation. But it does not necessarily follow that the power to regulate includes the ability to adjudicate. And even if it did, what the Longs assert here is a broad power, never before recognized by this Court, that extends to non-consensual tort claims.

*Montana* and *Strate* both rejected tribal authority to regulate nonmember activity within a reservation on nonmember fee land because the tribes had no retained inherent authority. *Montana*, 540 U.S. at 564-65; *Strate v. A-1 Contractors*, 520 U.S. 438, 456-59 (1997). In *Hicks*, on the other hand, this Court noted that land ownership was but one factor to consider in the jurisdictional analysis, but then rejected tribal authority to regulate nonmember activity on member land within the reservation. *Hicks*, 533 U.S. at 360, 374-75.

The Longs' efforts to cast doubt on the Bank's land ownership indicate the significance of nonmember land ownership in the context of the *Montana* analysis. *See* Resp. Br. at 47. Indeed, with a single exception, *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) – a zoning case with no majority opinion – this Court has

"never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Hicks*, 533 U.S. at 360. The Longs' assertion that this case involves both nonmember fee land and tribal trust land is incorrect. Resp. Br. at 54.

Whether the Long Company grazed cattle on tribal trust land within the Reservation is irrelevant to the jurisdictional analysis. It does not change the fact that the leased land is nonmember owned. The Bank owned the land it leased to the Long Company. It had a deed. JA 113-15. Since deciding *Montana*, this Court has consistently "rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude.'" *Hicks*, 533 U.S. at 359. As dependent domestic sovereigns, tribes retain only those powers necessary for self-government and to control internal relations, *id.* – circumstances in no way implicated by the contractual lending agreement between a member-owned South Dakota corporation and the nonmember Bank.

### B. The Bank Did Not Consent to Tribal-Court Jurisdiction Under *Montana*'s Consensual-Relationship Exception.

Even assuming nonmember ownership of the land does not preclude *Montana* exception analysis, the consensual-relationship exception is not applicable here. If making BIA guaranteed loans to member-owned corporations means tribes may regulate, as

well as adjudicate, members' contract disputes against nonmembers, as well as any other related claims, then making BIA guaranteed loans is a riskier proposition than was previously appreciated.

### 1. The Long Company is not a tribal member.

*Montana*'s consensual-relationship exception requires the existence of a relationship between a member and a nonmember that amounts to consent by the nonmember to regulation by the tribe. *See Montana*, 450 U.S. at 565-66. The Bank had a contractual relationship with the Long Company to lease it land, and to request BIA guarantees to facilitate loans. It had no contractual relationship with Ronnie and Lila Long under the December 1996 agreements. Because no relationship existed between a member and a nonmember, the consensual-relationship exception is inapplicable.

The Longs rely on the South Dakota Supreme Court's decision in *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395 (2003), *vacated in part on partial reh'g*, 674 N.W.2d 314 (S.D. 2004), to suggest the Long Company should be considered a tribal member. *Pourier*, however, does not support this proposition. *Pourier* involved tribal state-tax immunity. The court concluded that a corporation owned by a tribe or an enrolled tribal member, residing on an Indian reservation for the benefit of reservation Indians, is an

enrolled member for the limited purpose of protecting state-tax immunity. *Pourier*, 658 N.W.2d at 404.

This lawsuit, however, has nothing to do with state-tax-immunity issues. The Longs offer no sound reason for concluding that the Long Corporation is a tribal member for purposes of the consensual-relationship exception. Interestingly, *Pourier* cites this Court's decision in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), noting that "[t]he United States Supreme Court has stated that a corporation has no racial identity and cannot be the target of alleged discrimination." Because the Long Company, a South Dakota corporation, has no racial identity, it cannot be a tribal member for purposes of analyzing the consensual-relationship exception.

**2. The Bank did not consent to tribal regulation of its contracts with the Long Company.**

Even assuming this Court determines the Long Company was a tribal member, the consensual-relationship exception remains inapplicable. The Bank did not consent to tribal regulatory jurisdiction when it entered into contracts with the Long Company. The Longs offer no valid support for their conclusory assertion to the contrary. Nowhere in the contractual agreements between the Bank and the Long Company did the parties agree that the Tribe could regulate the parties' business relationship.

JA 96-106. The absence of a choice-of-law or forum-selection clause in the lending contract cannot be read as acquiescence to tribal regulation.

*Montana* established a general rule that Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation. A contract that does not explicitly consent to tribal regulation should therefore be interpreted consistent with that rule rather than its exceptions. To conclude otherwise would be to turn the general rule on its head. Determining whether a nonmember has knowingly stepped across the line "where tribal jurisdiction begins and ends" requires more than contractual silence. *See Hicks*, 533 U.S. at 383 (Souter, J., concurring).

### 3. Tribal-court adjudication of nonmembers activities is not an "other means" of regulating their conduct under the consensual-relationship exception.

Even assuming the Long Company was a tribal member, and that the Bank consented to tribal regulation of its contractual relationship with the Long Company, the consensual-relationship exception is still inapplicable because adjudication is not an "other means" of regulating nonmember conduct.

Contrary to the Longs' assertions, and the Eighth Circuit's decision, adjudication and regulation are not the same. Indeed, this Court knows the difference.

*See, e.g., Bank One Chicago N.A. v. Midwest Bank & Trust, Co.*, 516 U.S. 264, 273 (1996) ("Congress no doubt intended rules regarding interbank losses and liability to be developed administratively. But nothing in § 4010(f)'s text suggests that Congress meant the Federal Reserve Board to function as both regulator and adjudicator in interbank controversies. Rather, subsections (f) and (d) fit a familiar pattern: *agency regulates, court adjudicates.*") (emphasis added); *see also Rapanos v. United States*, 547 U.S. 715, 780-81 (2006) ("Through regulations *or* adjudication, the Corps may choose to identify categories of tributaries.") (emphasis added).

Had this Court wanted to recognize tribal-court adjudicatory jurisdiction over claims against nonmember defendants as an "other means" of regulating their conduct under the consensual-relationship exception, it could have put this language in the exception. But it did not. Instead, when contemplating regulation, this Court referred to only "taxation, licensing," and "other means." It then created the second exception, which contemplated non-consensual tribal-court civil authority in circumstances affecting the tribe's inherent powers to govern itself, control internal relations amongst its members, or the health or safety of the tribe – circumstances not at issue here. *Montana*, 450 U.S. at 565-66.

Congress has not explicitly granted tribal courts the power to adjudicate rights of nonmembers against whom tribal members have brought claims (particularly claims rooted in tribal law). Dependent status

has divested tribes of that power. Without delegation of that power from Congress, tribes have no such right.

The Longs and the United States both argue that where a tribe has authority to regulate nonmember conduct under the consensual-relationship exception, it must have the power to adjudicate as well. But all that the *Iowa Mutual*, *Nat'l Farmers*, *Strate*, and *Hicks* line of decisions establish regarding this issue is that adjudicatory jurisdiction does not exceed regulatory jurisdiction. *See, e.g.*, *Strate*, 520 U.S. at 453. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Nat'l Farmers*, 471 U.S. 845; *Hicks*, 533 U.S. 353. *Hicks* goes further, however, raising the question whether adjudicatory jurisdiction exists under the consensual-relationship exception. *Hicks*, 533 U.S. at 374. *Strate* set a ceiling; *Hicks* cast doubt on the foundation. Whether regulatory and adjudicatory jurisdiction are coextensive, "surely deserves more considered analysis." *Hicks*, 533 U.S. at 374.

The Longs' and United States' argument that *Williams v. Lee*, 358 U.S. 217, provides adjudicatory jurisdiction where there is regulatory jurisdiction under the consensual-relationship exception misunderstands its context. *Williams* involved a question of state adjudicatory authority. In that case, a nonmember sought to sue a tribal member in Arizona state court. This Court held that the nonmember's only recourse was to sue the member in tribal court. *Williams* does not stand for the proposition that tribal civil adjudication of a member's claim against a

nonmember defendant is an "other means" of regulation under the consensual-relationship exception.

**4. The Bank did not consent to tribal adjudication of the Long Company's contract claims.**

The Bank limited its question presented to whether the Longs' discrimination claim was properly brought before the Tribal Court as an "other means" of regulating its conduct under the consensual-relationship exception. The Longs, however, principally rely upon the contractual relationship between the Long Company and the Bank as a jurisdictional justification to support the Tribal Court's adjudication of the Longs' tort claim. By making this argument, the Longs widen the discussion to permit consideration of the associated jurisdictional deficiencies.

Even assuming, for the sake of argument, that the Bank consented to tribal regulation of its contract with the Long Company, such consent would not include consent to adjudicate the Long Company's contractual claims in tribal court. Consent to regulatory and adjudicatory jurisdiction are two entirely different propositions. A consensual relationship for one purpose, *e.g.*, taxation, is not tantamount to consent to adjudication of tort claims in tribal court. As this Court said in *Atkinson*, consent is not, "in for a penny, in for a Pound." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). Nevertheless, the Longs assert that because tribes can regulate nonmembers

as a price of doing business with members, it follows that tribes can enforce that regulation through adjudication. Resp. Br. at p. 44. This Court has never directly ruled on this question.

The Longs nevertheless maintain that this case fits comfortably within the model of consensual relations described in the cases supporting consensual-relationship exception. Resp. Br. at 43. Yet the two cases they claim support this assertion have nothing to do with tribal-court adjudicatory jurisdiction. *See Morris v. Hitchcock*, 194 U.S. 384, 393 (1904); and *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (discussing circumstances in which a tribe can tax a nonmember as a way of regulating its conduct). Indeed, in *Atkinson*, this Court concluded a tribe has no taxing authority over nonmembers' activities on land held by nonmembers in fee. *Atkinson*, 532 U.S. at 659. As a practical matter, tribal taxation as a means of regulating nonmembers on fee land within a reservation is not analogous to civil adjudication of claims against that nonmember in tribal court. Here, the Longs wholly fail to identify any form of regulation the Tribe could properly exercise over the Bank, given that the Bank owned the land in question.

This Court's disposition of the consensual-relationship exception in *Strate* and *Atkinson* highlights the need to identify with care the foundational "consensual relationship" with the tribe and the connection– or *quid pro quo* – between that relationship and the tribal regulation or claim in dispute. Adjudication of a tribal claim in tribal court is far

different than tribal taxation or licensing of a nonmember. Consent to tribal adjudication should be actual and clear, as opposed to the type of consent implied in the taxation decisions cited by the Longs, where there was no express consent by the nonmember to the regulation as the price for being permitted to engage in the regulated activity. No such consent exists here.

The Longs also acknowledge that the reason the Bank sought assistance from the Tribal Court relating to the land was because it believed off-reservation process servers could not effectuate service of process on the Reservation. Resp. Br. at 13. The Bank asked the Tribal Court to serve the notice to quit. The notice stated the Bank's intent to seek damages under South Dakota law. JA 144. Appointment of a process server by a court is not analogous to filing an action in tribal court as a plaintiff. The Bank used the Tribal Court for the sole purpose of effecting service in connection with a state court proceeding – much like the search warrant issued in *Hicks*.

The Bank did not consent to adjudication of any claims (contract or tort) in tribal court by entering into two contracts with the Long Company, a business entity not even recognized under tribal law. *See* Cheyenne River Sioux Tribe's Amicus Brief at 20, n.20. The Longs organized the Long Company under South Dakota law to take advantage of limited liability, as well as the increased borrowing capacity afforded under the BIA loan-guarantee program to Indian-owned entities. But they now ask this Court to

imbue the Long Company with tribal-membership status. They seek to force the Bank to defend claims in Tribal Courts under the auspices of "regulation."

But they miss the point. The Bank and the Long Company are both South Dakota corporations. Fundamental principles of American law counsel that a dispute arising between such entities should be brought in South Dakota state court – a forum equally accessible and open to the parties.

In any event, it would be a mistake to conclude, as the Longs urge, that the Tribal Court properly exercised jurisdiction over the Long Company's contract claims. This issue becomes pertinent only if it were to be the basis for concluding that the Tribal Court properly exercised jurisdiction over the discrimination claim.

**5. The Bank did not consent to tribal adjudication of the Longs' discrimination claim.**

Although there was no contractual relationship between the Bank and the Longs in their personal capacities, it was the latter who brought the discrimination claim against the Bank in Tribal Court. For the sake of argument, even assuming the Bank consented to tribal-court adjudication of the Long Company's contract claims, it did not consent to adjudication of the discrimination claim.

The Longs ignore the Bank's argument that a tort is, by definition, a claim predicated upon an injury sustained that does not arise out of a contract. Instead, they argue that because there is a connection between the Bank's contract with the Long Company and their discrimination claim against the Bank, tribal-court adjudicatory jurisdiction over the contract claim also extends to their tort claim. This argument is unsound.

Tribal authority to regulate nonmembers is extremely limited. The several principles of the consensual-relationship exception must be satisfied. The further leap to adjudication as a stand-alone "other means" of regulation is inconsistent with the nature of the exception. But further permitting tribal adjudication of all claims connected in some fashion to a consensual relationship goes too far. It would expand the scope of "consensual" tribal-court jurisdiction over nonmember defendants to essentially any claim bearing some connection to a commercial relationship.

### C. Because This Case Does Not Involve the Tribe's Ability to Govern Itself or Control Its Internal Relations, *Montana*'s Second Exception Is Inapplicable.

The Longs' representation that "neither the district court nor the court of appeals addressed application of the second exception" is incorrect. In

fact, the District Court determined this case patently did not fall within the second exception. A-33-34. The Longs failed to appeal that determination, and the Eighth Circuit did not explicitly reach this issue, having determined tribal-court adjudication to be an "other means" of regulating the Bank's conduct under the consensual-relationship exception. A-14, n.7.

The second exception is inapplicable. A rudimentary commercial-lending relationship between a bank and a member-owned South Dakota corporation does not implicate the rights of reservation Indians to make their own laws and be ruled by them. *See Strate*, 520 U.S. at 459. If the second exception were so broadly interpreted, it would swallow the general rule. Indeed, since formulating the second exception in 1981, this Court has never applied it to find tribal civil-adjudicatory jurisdiction over a nonmember defendant. It should not do so here.

Moreover, the Longs have entirely adequate remedies before federal or state courts. There is no basis to conclude that tribal-court authority is essential to preserving internal self-governance, which under *Strate* is the test for determining the reach of the second exception. *Strate*, 520 U.S. at 459.

## CONCLUSION

This Court should vacate the judgment of the Eighth Circuit Court of Appeals, and remand this case for further proceedings.

Respectfully submitted,

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Dated: April 4, 2008

# AMICUS CURIAE BRIEF

(13)

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No. 07-411

# In the Supreme Court of the United States

PLAINS COMMERCE BANK, PETITIONER

*v.*

LONG FAMILY LAND AND CATTLE COMPANY, INC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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## QUESTION PRESENTED

Whether Indian tribal courts have subject-matter jurisdiction to adjudicate civil tort claims arising out of private commercial agreements between a nonmember bank owning fee land on a reservation and a member-owned corporation.

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# In the Supreme Court of the United States

No. 07-411

PLAINS COMMERCE BANK, PETITIONER

*v.*

LONG FAMILY LAND AND CATTLE COMPANY, INC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS**

## INTEREST OF THE UNITED STATES

This Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government" through means including the "development" of "[t]ribal courts." *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 14-15 (1987). Finding that "tribal justice systems are an essential part of tribal governments," 25 U.S.C. 3601(5), Congress provided federal support for tribal courts in the Indian Tribal Justice Act, 25 U.S.C. 3601 *et seq.* The United States has consistently participated as amicus curiae in cases implicating tribal courts' authority. See, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353 (2001); *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997); *Duro* v. *Reina*, 495 U.S. 676 (1990). The Uni-

ted States also has a substantial interest in this case by virtue of its role, under the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, as guarantor of loans that underlie the dispute.

## STATEMENT

1. "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Iowa Mut.*, 480 U.S. at 14-15 (citation omitted). The Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.*, "manifest[s] a congressional purpose to protect tribal sovereignty from undue interference," *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 63 (1978). More recently, in the Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. 3651 *et seq.*, Congress reiterated that "tribal justice systems are an essential part of tribal governments" and that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." 25 U.S.C. 3651(5) and (6); see also *Santa Clara Pueblo*, 436 U.S. at 65. To support the development of tribal courts, Congress has established special federal programs in the Department of the Interior and the Department of Justice. See 25 U.S.C. 3611, 3661, 3662, 3681; see also Bureau of Justice Assistance, U.S. Dep't of Justice, *Fact Sheet: Tribal Courts Assistance Program* 1-2, 4 (Winter 2007) <http://www.ojp.usdoj.gov/BJA/grant/TCAP_Fact_Sheet.pdf> (describing Tribal Courts Assistance Program and identifying recent grant recipients, including the Cheyenne River Sioux Tribe).

In part because of such initiatives, the number of tribal courts and the number of cases on their dockets

have increased sharply, and there have been significant advances in the professional qualifications of tribal judges and lawyers.[1]

Congress has recognized tribal courts' jurisdiction to adjudicate important questions of federal law. See, *e.g.*, *Santa Clara Pueblo*, *supra* (recognizing authority to enforce Indian Civil Rights Act); 25 U.S.C. 1911(a) (authorizing exclusive jurisdiction over disputes under the Indian Child Welfare Act); 12 U.S.C. 1715z-13(g)(5) (authorizing federal government to bring mortgage-foreclosure actions against reservation homeowners in tribal or federal court). And, although federal law requires full faith and credit for tribal-court judgments only in certain areas,[2] some States generally afford full faith and credit,[3] and others routinely enforce tribal-court judgments under principles of comity.[4]

2. This case arises from a series of commercial contracts between petitioner (a South Dakota banking corporation), respondents Ronnie and Lila Long (both enrolled members of the Cheyenne River Sioux Tribe (CRST or Tribe)), and respondent Long Family Land

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[1] See Honorable Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 2 (1997) ("The tribal courts, while relatively young, are developing in leaps and bounds.").

[2] See, *e.g.*, 18 U.S.C. 2265 (2000 & Supp. V 2005) (domestic violence orders); 25 U.S.C. 1911(d) (child custody orders); 25 U.S.C. 3106(c) (National Indian Forest Resources Management Act); 25 U.S.C. 3713(c) (American Indian Agricultural Resource Management Act).

[3] See *Halwood* v. *Cowboy Auto Sales, Inc.*, 946 P.2d 1088, 1089 (N.M. Ct. App. 1997); *Sheppard* v. *Sheppard*, 655 P.2d 895 (Idaho 1982).

[4] See, *e.g.*, *Day* v. *State Dep't of Soc. & Rehab. Servs.*, 900 P.2d 296, 301 (Mont. 1995); *Barrett* v. *Barrett*, 878 P.2d 1051 (Okla. 1994); *Gesinger* v. *Gesinger*, 531 N.W.2d 17 (S.D. 1995); *Teague* v. *Bad River Band of Lake Superior Tribe of Chippewa Indians*, 665 N.W.2d 899, 918-920 (Wis. 2003); N.D. Rules of Court 7.2.

and Cattle Company (the Company), a closely held family farming and ranching business incorporated under the laws of South Dakota in 1987. J.A. 14-17, 159. In accordance with its articles of incorporation, J.A. 17, at least 51% of the Company's outstanding shares have at all times been Indian-owned in order to qualify for federal loan guarantees. Pet. App. A2.

The Company operated its cattle ranch solely within the boundaries of the CRST Reservation. Pet. App. A2. Its operations were located on 6400 acres of tribal trust land that were leased for grazing, Resp. Br. 4-5, and on 2230 acres of land that were jointly owned by Kenneth and Maxine Long (the parents of respondent Ronnie Long), and then, after tribal member Maxine Long's death in 1992, solely by Kenneth Long (a nonmember), J.A. 159-160.

Beginning in 1989, petitioner made a series of commercial loans to the Company. Pet. App. A45. As part of the loan agreements, Kenneth and Maxine Long used their home and the 2230 acres of land as collateral, petitioner received a security interest in the Company's livestock and equipment, and Kenneth, Maxine, Lila, and Ronnie Long each personally guaranteed loans extended to the Company. J.A. 21-38, 42-45.

Petitioner's loans to the Company were also repeatedly guaranteed by the U.S. Department of the Interior's Bureau of Indian Affairs (BIA). J.A. 39-40, 70-72, 77-85; Pet. App. A2-A3. Under the Indian Financing Act, Congress has authorized federal "guarantee[s]" of up to 90% of "the unpaid principal and interest due on any loan made to any organization of Indians" or "to individual Indians," "[i]n order to provide access to private money sources which otherwise would not be available." 25 U.S.C. 1481. The BIA will thus guarantee a

loan made to an "Indian-owned * * * business activity" organized "pursuant to state, federal or tribal law," as long as "Indian ownership" is at least 51%. 25 C.F.R. 103.1, 103.7 (1996).[5] The loans to be guaranteed are "for financing economic enterprises which contribute beneficially to the economy of an Indian reservation." 25 C.F.R. 103.2 (1996).

Kenneth Long died in July 1995, and petitioner filed a claim of almost $700,000 against his estate. J.A. 160; Pet. Br. 5; Resp. Br. 6-7. Respondents argue that his land and interest in the Company were inherited by his children, who assigned their interests to Ronnie Long. J.A. 160; Resp. Br. 6-7. Petitioner asserts that its claim against the estate prevented the distribution of assets to Kenneth Long's heirs. Pet. App. A2 & n.2; Pet. Br. 7.

In the spring of 1996, petitioner's representatives came onto the Reservation to inspect the Company's operations and assets. Pet. App. A3. Petitioner and respondents began discussing revised loan terms. *Ibid.* Some of their negotiations took place at the Tribe's offices and were facilitated by tribal officers and BIA employees. *Ibid.* Respondents claim that petitioner offered to make operating loans to the Company, provided that Kenneth Long's land and house were deeded to petitioner, which would then sell the land back to the Company on a 20 year contract for deed. J.A. 91; Pet. App. A3. Petitioner later changed the terms of the offer, stating that on the advice of counsel, it would not sell the land under a contract because of "possible jurisdictional problems if [petitioner] ever had to foreclose on [the]

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[5] The regulations cited in the text were effective at the time the dispute arose. The BIA revised Part 103 in 2001, and the majority-ownership requirement now appears at 25 C.F.R. 103.25 (2007).

land when it is contracted or leased to an Indian owned entity on the reservation." J.A. 91; Pet. App. A3.

On December 5, 1996, petitioner and the Company entered into two agreements during a meeting at petitioner's offices, located off the Reservation. J.A. 96-106. The parties entered into a new loan agreement, which stated that petitioner had received a deed for Kenneth Long's land from his estate. J.A. 104. The agreement credited $478,000 for the land and house against the outstanding loan balance. J.A. 104. Petitioner agreed to request BIA loan guarantees for an additional $70,000 operating loan and a $37,500 loan to purchase new calves. J.A. 105. In a second agreement, the Company received a two-year lease of the land, with an option to purchase the land at the end of the lease for $468,000. J.A. 96-100. The estate deeded the 2230 acres to petitioner on December 10, 1996. J.A. 113-115.

Respondents later alleged that petitioner did not make loans required by the agreement, J.A. 164-165, while petitioner claimed that it did make at least some of the loans, and that the loans were contingent upon BIA loan guarantees, which were not provided.[6] Pet. App. A28. Without the money, the Company could not move feed to its livestock on the grazing land, and hundreds of them died during the harsh winter of 1996-1997. J.A. 165. The Company was thus unable to exercise its option to repurchase the land when the lease expired. J.A. 167. Petitioner later submitted a claim on the fed-

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[6] In response to petitioner's application for another loan guaranty, the BIA requested additional information, which petitioner never provided. J.A. 118-119.

eral loan guarantees and received $392,968.55 from the BIA.[7] Pet. App. A35.

On May 19, 1999, petitioner initiated proceedings in state court to evict respondents from the 2230-acre parcel and asked the tribal court to serve them with a notice to quit. J.A. 144-147. Petitioner then contracted to sell the land to non-Indians, but respondents continued to occupy 960 acres. J.A. 141; Pet. App. A4.

3. a. In July 1999, respondents filed suit against petitioner in the Cheyenne River Sioux Tribal Court, seeking an injunction to prevent their eviction from the ranch land and its sale by petitioner. J.A. 1. Filing an amended complaint in January 2000, they asserted a variety of claims, including breach of contract, bad faith, violation of tribal-law self-help remedies, and discrimination. J.A. 158, 163-174. The discrimination claim—the only claim still at issue—alleged that petitioner had sold the land to nonmembers on more favorable terms than those it had offered to respondents. J.A. 172-173.

Petitioner's answer included a general statement that the tribal court lacked subject-matter jurisdiction, and a claim that the court lacked jurisdiction over petitioner because its main place of business was outside the boundaries of the Reservation. J.A. 181. Petitioner also stated a counterclaim, "in the event the Court finds that it does have jurisdiction," alleging that respondents were in wrongful possession of the 960 acres of land and seeking their eviction. J.A. 184-185.

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[7] In return for its payment to petitioner, the BIA obtained assignments of two loans in 2000. See 05-CV-3002 Docket Entry No. 38, Attach. 22 (D.S.D. Dec. 9, 2005). This Office has been informed by the BIA that the Company made some payments in November 2002, but the outstanding balance on the two loans is more than $350,000 (including interest).

Before trial, petitioner unsuccessfully moved for summary judgment on its counterclaim, pursuant to Rule 56 of the Rules of Civil Procedure, in which it stated that the tribal court had jurisdiction over respondents because "the majority ownership of the corporation is owned by Ronnie Long and Lila Long, enrolled members of the Cheyenne River Sioux Tribe." J.A. 187-188. Petitioner also conceded in that motion that "the Court has jurisdiction over the subject matter of this action," without repeating or adverting to the jurisdictional objection that had appeared in its answer. J.A. 188.

The judge submitted four of respondents' causes of action to the jury: breach of contract, bad faith, discrimination, and violation of tribal-law self-help remedies. J.A. 190-192; Pet. App. A5. As submitted, the discrimination claim was only by Ronnie and Lila Long, not the Company. J.A. 191. Shortly before the jury was charged, petitioner argued that the court lacked jurisdiction over the discrimination claim because it arose under federal law. Pet. App. A5. The court rejected that argument. *Ibid.*

The jury found in respondents' favor on three of the four causes of action—breach of contract, bad faith, and discrimination—and awarded damages of $750,000 plus interest. Pet. App. A73; J.A. 190-192. It found, however, that petitioner had not engaged in impermissible self-help by selling the land. J.A. 191.

Petitioner filed a post-trial motion for judgment notwithstanding the verdict, in which it renewed its challenge to the court's jurisdiction over the discrimination claim (but not the other claims). Pet. App. A79-A80. The tribal court denied the motion, finding that it had

jurisdiction over a discrimination claim brought under federal law. *Id.* at A80-A81.

The tribal court entered judgment awarding respondents $750,000 plus interest. J.A. 194-196. The Company then filed a "request to exercise its option to purchase all of the land conveyed * * * from the estate of Kenneth Long to [petitioner], including the land" that had been purchased by nonmembers. Pet. App. A69. The tribal court issued a supplemental judgment finding that respondents maintained an option to purchase only the 960-acre parcel they still occupied, and not the lands that petitioner had already sold. *Id.* at A70. The court also ordered that the price for exercising the option could be offset against the damages award if petitioner filed a quitclaim deed. *Id.* at A71.

b. Petitioner appealed to the Cheyenne River Sioux Tribal Court of Appeals, raising six non-jurisdictional issues and repeating its challenge to tribal-court jurisdiction over the discrimination cause of action. Pet. App. A49-A50 (listing issues); see also *id.* at A51 (noting that petitioner "does *not* challenge (on appeal) the general jurisdiction of the Cheyenne River Sioux Tribal Court over the lawsuit"). The Tribal Court of Appeals affirmed the trial court on all issues. *Id.* at A68.

In rejecting petitioner's jurisdictional challenge, the court first held that respondents' discrimination claim did not arise under federal law, but rather arose under the traditional common law of the Tribe, which—in what the court called a "direct and laudable convergence of federal, state, and tribal concern"—prohibits discrimination on the basis of race or tribal affiliation. Pet. App. A55-A56.

The court then analyzed tribal-court jurisdiction under the standards in *Montana* v. *United States*, 450 U.S.

544 (1981). Pet. App. A56-A57. It noted *Montana*'s general rule that "tribal courts generally do *not* have jurisdiction over non-Indians involving matters that arise on fee land within the reservation." *Id.* at A56. But it held jurisdiction over petitioner was appropriate in this case under both of the exceptions to that general rule. With regard to *Montana*'s first exception, the court found the case to be "the prototype for a consensual agreement," because it involves a contract between "a tribal member and a non-Indian bank" that dealt solely with ranching operations located on the Reservation and was negotiated in part on the Reservation, with the personal involvement of tribal officials and BIA personnel. *Id.* at A56-A57. With regard to the second *Montana* exception, the court found that the case "clearly involves the 'economic security' of the Tribe," as evidenced by the "large role" that tribal officials played in the dealings between petitioner and respondents in order to foster the success of a members' "ranching operation on the Reservation." *Id.* at A57.

4. a. Petitioner then filed this action in the District Court for the District of South Dakota seeking a declaratory judgment that, *inter alia*, the tribal courts had lacked subject-matter jurisdiction over respondents' discrimination claim (but not their claims for breach of contract or bad faith). Pet. App. A24, A33. The district court granted summary judgment in favor of respondents. *Id.* at A24-A44.

Applying the first *Montana* exception, the district court considered whether petitioner had entered into a contractual agreement with the Tribe or its members. Pet. App. A34-A40. The court concluded that petitioner had entered into a loan agreement with respondent Long Company with "tribal membership in mind," and

that the loans likely would not have been possible but for the BIA guarantees that were available only because the Company is a majority-owned Indian business. *Id.* at A35. The district court considered it important that the case "involves a non-member's direct contractual involvement with a Native American owned corporate entity and concerns land located wholly within the boundaries of the CRST reservation." *Id.* at A35-A36. The court also found that the "claimed tortious conduct of [petitioner] has a clear nexus with the contractual dealings between [petitioner] and the Long Company," and that in such circumstances, tort law is an appropriate means of tribal regulation under *Montana*. *Id.* at A36-A38. Finally, the district court noted that petitioner had conceded the jurisdiction of the tribal court in briefing its counterclaim that respondents were wrongfully holding over on the 960-acre parcel. *Id.* at A39.

b. The court of appeals affirmed. Pet. App. A1-A23. It concluded that petitioner had "engaged in the kind of consensual relationship contemplated by *Montana*" when it "transacted with a corporation of conspicuous tribal character" and "formed concrete commercial relationships with the Indian owners of that corporation." *Id.* at A12. It also found that there was a sufficient "nexus" between the tribal regulation and "the consensual relationship," because the Tribe had subjected petitioner to "liability for violating tribal antidiscrimination law in the course of its business dealings with [respondents]." *Id.* at A12, A14.[8]

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[8] Finding jurisdiction appropriate under the first *Montana* exception, the court of appeals declined to address the second. Pet. App. A14 n.7. Thus, petitioner errs in stating (Br. 30) that "the Circuit Court properly concluded this was not a second *Montana* exception case."

The court rejected petitioner's argument that respondents' discrimination claim was beyond tribal-court jurisdiction because it was actually a federal-law claim,[9] as well as the argument that petitioner was denied due process in the tribal court. Pet. App. A15-A23. Petitioner "explicitly" excluded those arguments from its petition for a writ of certiorari. Pet. i n.1.

## SUMMARY OF ARGUMENT

I. A. In *Montana* v. *United States*, 450 U.S. 544 (1981), this Court recognized that there are exceptions to the general proposition that a Tribe's "inherent sovereign powers * * * do not extend to the activities of nonmembers of the tribe." *Id.* at 565. In particular, it recognized that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Ibid.* That framework—including the exception for consensual relationships—governs a tribal court's jurisdiction over nonmembers. See *Strate* v. *A-1 Contractors*, 520 U.S. 438, 453 (1997).

B. Petitioner claims that the *Montana* exceptions can never apply in cases involving non-Indians and non-Indian fee land. That contention, however, is inconsistent with *Montana*'s own language and with later decisions that evaluated the availability of jurisdiction under the exceptions even when the conduct in question involved non-Indian fee land. See, *e.g.*, *South Dakota* v.

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[9] Although petitioner argued in the tribal courts and in the federal district court that the discrimination claim arose under 42 U.S.C. 1981, it argued in the Eighth Circuit that it arose under 42 U.S.C. 2000d. Pet. App. A8, A15.

*Bourland*, 508 U.S. 679, 695-696 (1993); *Strate*, 520 U.S. at 451-453.

C. The *Montana* exceptions logically include tribal authority to regulate through adjudication in tribal courts, including through the enforcement of common-law tort rules of conduct and liability. That conclusion is supported by this Court's decisions, which have consistently treated *Montana*'s acknowledgment of tribal authority as encompassing adjudicatory jurisdiction. See *Strate*, 520 U.S. at 451-453; *Nevada* v. *Hicks*, 533 U.S. 353, 359 n.3, 372 (2001); *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 654-656 (2001). It is also bolstered by policy considerations, since limiting tribal-court jurisdiction over matters within Tribes' regulatory authority would greatly impinge upon their powers of self-government.

II. Petitioner engaged in a series of private commercial transactions with respondents. In light of the parties' course of dealing, petitioner was subject to tribal jurisdiction over disputes arising out of those transactions. The course of dealing was indispensably predicated on respondents' Indian status, which made it possible for the federal government to guarantee the loans under the Indian Financing Act—and ultimately to compensate petitioner for a sizable portion of respondents' default. The subject-matter of the negotiations involved a single ranching operation on both tribal and private land within the CRST Reservation; some of the negotiations directly involved tribal officials; and the same course of dealing spawned closely related contract claims that were adjudicated in tribal court without objection from petitioner.

For *Montana* purposes, a member-owned corporation should be treated as a tribal member—especially

when the corporation is (as here) closely held, doing business on the reservation, and imbued with an Indian identity by virtue of a federal program that is a necessary part of the underlying commercial dealings.

Nor should the Court impose a heightened standard for establishing a nonmember's consent to tribal jurisdiction. It would be inconsistent with federal policy supporting tribal self-determination to create an equivalence between the level of consent necessary for private individuals to be sued in tribal court and the standard for waiver of a Tribe's immunity to suit in state courts.

## ARGUMENT

### THE TRIBAL COURTS HAD JURISDICTION OVER RESPONDENTS' DISCRIMINATION CLAIM BECAUSE IT AROSE DIRECTLY OUT OF PETITIONER'S CONSENSUAL CONTRACTUAL DEALINGS WITH TRIBAL MEMBERS AND A MEMBER-OWNED COMPANY

Indian Tribes possess "inherent powers of a limited sovereignty which has never been extinguished." *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978) (emphasis and internal quotation marks omitted). Tribal authority includes "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of [tribes'] dependent status." *Id.* at 323. In *Montana* v. *United States*, 450 U.S. 544, 565 (1981), the Court explained that Tribes retain inherent power to "regulate * * * the activities of nonmembers who enter consensual relationships" with Tribes or their members, "through commercial dealing, contracts, leases, or other arrangements." Petitioner's categorical attacks on the availability of such jurisdiction are inconsistent with *Montana* itself, with this Court's subsequent application of *Montana*, and with the principles on which it is based.

This case falls comfortably within *Montana*'s terms because petitioner's consensual dealings with respondents were overwhelmingly tribal in character.[10]

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[10] Respondents argue (Br. 25-37) that petitioner lacks standing to challenge the tribal courts' jurisdiction over their discrimination claim because petitioner suffered no injury from the adjudication of that claim. Although this point is raised for the first time in respondents' brief on the merits, the Court has "an obligation to assure [itself] of litigants' standing under Article III." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 340 (2006) (internal quotation marks omitted). Petitioner, as the plaintiff, would have had the burden of presenting evidence of injury, causation, and redressibility sufficient to survive summary judgment if its standing had been challenged by respondents through adequate averments or clear evidence. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Here, however, respondents' challenge is not of that character. To the extent an evidentiary basis for standing is nonetheless required, this Court may examine the record before it to determine whether standing exists. See, *e.g.*, *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 330 (1999).

At this point, the principal question appears to be whether, on the basis of tribal-court documents in the record, petitioner would receive any concrete benefit from a declaration that the tribal courts lacked jurisdiction over the discrimination claim. Respondents present (Br. 25-37) a plausible argument that the legal and equitable relief they received is entirely attributable to their other claims. That argument appears to be based primarily on legal conclusions regarding the course of proceedings in the tribal courts, not the absence of any further *factual* submission by petitioner in federal district court. Because petitioner has not yet had a chance to answer respondents' arguments concerning the proceedings in the tribal courts and the resulting absence of injury and standing—and because that response may shed further light on the nature and proper legal characterization of the particular proceedings and judgment in the tribal courts—the United States does not take a position on the standing question at this juncture.

## I. *Montana* v. *United States* Provides The Proper Framework For Evaluating Tribal-Court Jurisdiction

### A. *Montana* Generally Governs Tribal-Court Jurisdiction Over Nonmembers

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 451 (1997) (quoting *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987)). Accordingly, tribal courts are an "appropriate forum[]"—sometimes the exclusive forum—for the adjudication of "disputes affecting important personal and property interests of both Indians *and non-Indians*." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978) (emphasis added). This Court has rejected attacks on the institutional competency of tribal courts as contrary to its own precedents, *id.* at 65-66, and to "congressional policy," *Iowa Mut.*, 480 U.S. at 19.

The Court has upheld tribal courts' exercise of civil adjudicatory jurisdiction in various contexts affecting non-Indians. See, *e.g.*, *Williams* v. *Lee*, 358 U.S. 217, 223 (1959) (tribal court has exclusive jurisdiction to adjudicate on-reservation contract dispute brought by non-Indian against Indian; "[i]t is immaterial that respondent is not an Indian," because "[h]e was on the Reservation and the transaction with an Indian took place there"); *Santa Clara Pueblo*, 436 U.S. at 65-66 (tribal courts have jurisdiction to vindicate rights created by the Indian Civil Rights Act); *Kennerly* v. *District Ct.*, 400 U.S. 423 (1971) (per curiam).

The Court has also articulated a prudential rule that, in deference to "tribal self-government and self-determination," federal courts should generally refrain from considering challenges to a tribal court's exercise of ju-

risdiction over a case until the challenge has been considered by the tribal court itself. See *Iowa Mut.*, 480 U.S. at 15; *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985). Both of those cases arose out of suits in tribal court against non-Indian defendants based on their conduct within a reservation, and *Iowa Mutual* recognized that such suits are "presumptively" within a tribal court's jurisdiction, "unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18. Those decisions thus presuppose that tribal courts may exercise jurisdiction over suits against non-Indian defendants in appropriate circumstances.

The circumstances that are appropriate for the exercise of that jurisdiction are in turn governed by *Montana*, which for more than 25 years has supplied the framework for evaluating tribal civil authority over nonmembers for a variety of purposes. The Court has described *Montana* as "pathmarking," *Strate*, 520 U.S. at 445, and as "the most exhaustively reasoned of [the Court's] modern cases addressing" Tribes' "retained or inherent sovereignty." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 650 (2001); see also *Nevada* v. *Hicks*, 533 U.S. 353, 358 (2001) ("Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana*.").

In *Montana*, the Court explained that, "through their original incorporation into the United States as well as through specific treaties and statutes," Indian Tribes have been "implicit[ly] divest[ed]" of sovereignty over "relations between an Indian tribe and nonmembers of the tribe." 450 U.S. at 564 (internal quotation marks and emphasis omitted). The *Montana* Court thus articulated the "general proposition that the inherent

sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. Nevertheless, *Montana* also recognized that there are two exceptions to that general proposition:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

*Id.* at 565-566 (citations omitted).

In *Strate*, the Court held that *Montana* governed its analysis of whether a tribal court had jurisdiction over a car accident between two nonmembers on a state highway that ran through an Indian reservation. *Strate* concluded that, in the absence of "congressional direction enlarging tribal-court jurisdiction," *Montana*'s "main rule and exceptions" apply not only to Tribes' general regulatory authority but also to the "adjudicative jurisdiction" of tribal courts. 520 U.S. at 453; see also *Atkinson Trading Co.*, 532 U.S. at 652; *Hicks*, 533 U.S. at 359 n.3, 360-361.

Accordingly, *Montana*'s general proposition and its two exceptions provide the proper framework for determining the extent of tribal jurisdiction in this case.

### B. The Confluence Of A Nonmember And Non-Indian Fee Land Does Not Categorically Foreclose The Applicability Of *Montana*'s Exceptions

Notwithstanding *Montana*'s well-entrenched framework, petitioner argues (Br. 21) that there is simply no need to "determine whether either [*Montana*] exception applies" in this case, "because the land at issue is non-Indian-owned fee land." Thus petitioner contends (Br. 25) that the identity of the landowner "alone precludes tribal-court" jurisdiction. Petitioner's broad attack on tribal jurisdiction is squarely refuted by *Montana* and the cases that have applied it.

Petitioner's categorical assertion that activities pertaining to non-Indian fee land cannot be subject to tribal jurisdiction ignores the plain language of *Montana* itself. The very purpose of the *Montana* exceptions was to identify when Tribes may exercise "civil jurisdiction over non-Indians on their reservations, *even on non-Indian fee lands*." 450 U.S. at 565 (emphasis added).[11]

Petitioner's contention also ignores the Court's subsequent decision in *National Farmers Union*, which involved a tort suit by a tribal member against a school district (a political subdivision of the State) arising out of a motorcycle accident on state land within the Crow Reservation. See 471 U.S. at 847. The Court declined to find that tribal-court jurisdiction in such a case is "automatically foreclosed," *id.* at 855, and instead held that the tribal court should be given the opportunity to determine its own jurisdiction in the first instance. If petitioner's categorical rule were correct, jurisdiction

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[11] In describing the second exception, *Montana* again stated that a Tribe's civil authority can extend to "the conduct of non-Indians on fee lands within its reservation." 450 U.S. at 566.

*would* have been "automatically foreclosed," and tribal-court exhaustion would have been futile.

Petitioner's argument is further belied by the primary case on which it relies, *South Dakota* v. *Bourland*, 508 U.S. 679 (1993). Although petitioner contends (Br. 23) that "*Bourland* controls here" and that it establishes a rule divesting Tribes of all jurisdiction over nonmember-owned land within a reservation, that assertion is simply wrong. In *Bourland*, the Court held that certain statutes had abrogated the CRST's authority to regulate non-Indian hunting and fishing on specific lands that had been taken by the United States for a federal flood-control project. 508 U.S. at 690-691. More importantly, even after concluding that the CRST did not retain inherent authority to exclude persons from the land in question as a general matter, the Court proceeded to acknowledge the two *Montana* exceptions as "other potential sources of tribal jurisdiction over non-Indians *on these lands*." *Id.* at 694-695 (emphasis added). It then remanded the case for a determination whether the terms of either exception were satisfied. *Id.* at 696. If petitioner's view were the law, that remand would have been pointless, because it was already clear that the land was owned by the United States.

Petitioner also puts great stock in the Court's statement in *Hicks* that, "with one minor exception, [this Court has] never upheld under *Montana* the extension of tribal civil authority of nonmembers on non-Indian land." Pet. Br. 24 (quoting *Hicks*, 533 U.S. at 360). But *Montana* itself contemplates that there are situations in which the exercise of such jurisdiction is proper. See p. 18, *supra*. And *Hicks* decided only the narrow proposition that "tribal courts lack jurisdiction over state officials for causes of action relating to their performance of

official duties," regardless of who owns the land on which they act. 533 U.S. at 369; see also *id.* at 358 n.2 (leaving "open the question of tribal-court jurisdiction over nonmember defendants in general").[12]

The Court has not yet had occasion to consider the significance of land status in a case where there were extensive contractual relations between Indians and a nonmember that were relevant to the underlying dispute. In *Strate*, for example, the dispute arose between "two non-Indians involved in [a] run-of-the-mill [highway] accident," who had no "'consensual relationship' of the qualifying kind." 520 U.S. at 457 (brackets in original). Similarly, in *Atkinson Trading Co.*, the Court found that "a nonmember's actual or potential receipt of tribal police, fire, and medical services" did not form the requisite relationship, and that there was not a sufficient nexus between a hotel operator's federal license to transact business with the Navajo Nation and the occupancy tax imposed on the hotel's nonmember guests. 532 U.S. at 655-656. Nevertheless, in both cases the Court still *applied* the first *Montana* exception—evaluating whether the criteria under that exception were satisfied, but concluding on the merits that they were not—even after it was clear that the relevant property was owned or controlled by non-Indians.

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[12] While *Hicks* did not address the question of adjudicatory jurisdiction over non-Indians in general, it did observe that "there was little doubt that the tribal court had jurisdiction over [the] tort claims" in *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473 (1999), which were brought by tribal members against non-Indian corporations. *Hicks*, 533 U.S. at 368 (citing 526 U.S. at 482 n.4). While the claims in *Neztsosie* arose on Indian land, the statement in *Hicks*, like the other decisions discussed above, refutes any notion that tribal courts can *never* entertain tort suits against non-Indians.

Thus, as it did in *National Farmers Union*, *Strate*, and *Hicks*—as well as *Montana*, *Bourland*, and *Atkinson Trading*—the Court should decline to adopt a categorical rule that precludes consideration of the *Montana* exceptions in cases involving conduct of non-Indians that occurs on land owned by non-Indians. That is especially so here, because the assertedly non-Indian land at issue in this case was itself a principal subject of the contractual arrangements, which conferred on respondents an option to purchase the land (and thus restore it to Indian ownership).

### C. *Montana*'s Exception For Consensual Relationships Permits Tribal Regulation Through Adjudication Or Tort Law

Petitioner presses (Br. 27) another categorical argument: that the first *Montana* exception recognizes only Tribes' regulatory or legislative jurisdiction, and never encompasses the adjudicatory jurisdiction of tribal courts. But that alleged exclusion is inconsistent with *Montana* and other decisions of this Court, and is not supported by the principles underlying those decisions.

1. *Montana*'s first exception recognizes tribal authority to "regulate" nonmembers "through taxation, licensing, or other means," and cites four illustrative cases. 450 U.S. at 565-566. In *Strate*, the Court emphasized that those cases "indicate[] the type of activities the Court had in mind" for the first exception. 520 U.S. at 457. Three of the cases dealt with the authority of a Tribe to impose taxes on nonmembers. See *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Morris* v. *Hitchcock*, 194 U.S. 384 (1904); *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905). The fourth, however, addressed the authority of tribal

courts over suits brought by nonmembers. See *Williams* v. *Lee*, 358 U.S. 217 (1959). In *Williams*, a non-Indian who operated a general store on the Navajo reservation brought suit in state court to collect for goods sold to two Navajo Indians. The Court held that the state courts had no jurisdiction. Rather, the suit fell within the jurisdiction of the Navajo tribal courts, since the storeowner was "on the Reservation and the transaction with an Indian took place there." *Id.* at 223. Thus, *Montana*'s first exception clearly contemplates that civil adjudications are one "other means" of exercising tribal jurisdiction over nonmember conduct. Accordingly, when a non-Indian enters into a consensual relationship with a Tribe or its members, that relationship is brought within the legitimate reach of tribal governmental authority, as this Court held in *Colville*, *Morris*, *Buster*, and *Williams*, and that authority may be exercised through tribal courts as well as other organs of government.

In cases following *Montana*, the Court has consistently confirmed that the first exception may encompass tribal-court authority. *Strate* even called "unremarkable" the proposition that "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." 520 U.S. at 453 (brackets and internal quotation marks omitted). That statement directly contradicts petitioner's assertion that a Tribe may have regulatory jurisdiction under *Montana*'s first exception yet could never possess adjudicatory jurisdiction over the same conduct. *Strate* also held that *Montana* governs the scope of *tribal-court* jurisdiction over nonmembers, without making any distinction between the first and second exceptions, *id.* at

451-452, and it specifically evaluated the availability of tribal-court jurisdiction under *Montana*'s first exception, *id.* at 456-457, as well as the second, *id.* at 457-459—thus defeating petitioner's attempt (Br. 36-39) to associate adjudicatory jurisdiction exclusively with the second exception. Later cases also show that the first *Montana* exception is relevant to the scope of tribal-court jurisdiction. See *Hicks*, 533 U.S. at 359 n.3, 372; *Atkinson Trading Co.*, 532 U.S. at 654-656.

2. The Court's consistent approach is supported by sound policy, for it would make no sense to read civil adjudicatory authority out of the first *Montana* exception. If a Tribe has the authority to impose "regulatory" restrictions on nonmembers who enter consensual relationships with the Tribe or its members (which petitioner does not dispute), it ought to have its own means of enforcing those requirements. See *Cohen's Handbook of Federal Indian Law* 598 (Nell Jessup Newton et al. eds., 2005) ("If a tribe has power to apply its law to govern a dispute involving a nonmember, then its courts likely can hear the claim.").

"Tribal courts play a vital role in tribal self-government." *Iowa Mut.*, 480 U.S. at 14; accord 25 U.S.C. 3651(5). They are therefore appropriate forums for adjudications arising out of law that a Tribe adopts in the exercise of self-government and permissibly applies to non-Indians under *Montana*. While their jurisdiction may not be exclusive, a sovereign Tribe should be entitled to interpret and enforce its own law in the first instance.[13] Tribal authority over nonmembers on non-Indian land is already limited to those instances that fall

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[13] Cf. *Pernell* v. *Southall Realty*, 416 U.S. 363, 368-369 (1974) (discussing deference to state court's interpretation of state laws).

under one of *Montana*'s two exceptions; but when those criteria are met, tribal courts should be entitled to consider claims of noncompliance with legitimate tribal requirements.

Under petitioner's theory, however, Tribes and tribal members would be forced to seek out state courts to enforce tribal laws governing a nonmember's contractual relationships with them. In most cases, federal courts will not have jurisdiction over a contract or regulatory dispute between a Tribe or its members and a nonmember, because no statute generally provides for such jurisdiction. Even assuming that state courts would be available for such suits, see, *e.g.*, *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 148 (1984), that would make one sovereign's law subject to the interpretation of and enforcement by other sovereigns' courts, which would seriously undermine federal policies recognizing the centrality of tribal courts to tribal self-governance. See *Iowa Mut.*, 480 U.S. at 16 ("Adjudication of [reservation affairs] by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law."); see also pp. 2-3, *supra*. Indeed, because certain areas of the law—such as those governing contracts and torts—are typically developed in a common-law manner by courts, rather than through legislative enactment, petitioner's position would deprive Indian Tribes of an essential means of law*making*.

3. Petitioner and its *amici* offer no sound reason to distinguish tribal "regulation" via taxes, licensing, or statutory requirements from "regulation" via tort law.[14]

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[14] In finding that Tribes had been implicitly divested of adjudicatory jurisdiction in criminal matters, the Court relied in substantial part on

For that matter, neither petitioner nor its amici proffer a rationale that would explain why the tribal courts had jurisdiction over respondents' breach-of-contract and bad-faith claims, which petitioner appears to have conceded in the tribal trial court and has not since challenged, but lacked jurisdiction over respondents' discrimination claim, which arose out of the same contractual relationship. Cf. *Hicks*, 533 U.S. at 402 (Stevens, J., concurring in judgment) (noting that *Strate* "discusses the question whether a tribal court can exercise jurisdiction over nonmembers, irrespective of the type of claim being raised").

As a general matter, tort law is a well-recognized means of governmental regulation of conduct. See, *e.g.*, *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) (explaining that "a liability award [for a state common-law tort] can be, indeed is designed to be, a potent method of governing conduct and controlling policy") (internal quotation marks omitted). Here, as the federal court of appeals recognized, "[b]y subjecting [petitioner] to liability for violating tribal antidiscrimination law in the course of its business dealings with [respondents], the Tribe was setting limits on how nonmembers may engage in commercial transactions with members inside the reser-

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the fact that Congress had established *federal* jurisdiction over crimes committed by non-Indians against Indians on a reservation. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 201-204 (1978). By contrast, Congress has never granted federal courts general jurisdiction over civil disputes between Indians and non-Indians, and a seminal 1855 opinion of the Attorney General noted the significant difference between civil and criminal jurisdiction. *National Farmers Union*, 471 U.S. at 853-855; 7 Op. Att'y Gen. 175 (1855). Thus, because there are no distinct principles of implied divestiture of jurisdiction in civil cases, whether tribal courts have jurisdiction over a particular suit against non-Indians is properly governed by the general standards of *Montana*.

vation." Pet. App. A14. Indeed, the arbitrariness of distinguishing tort law from statutory or regulatory law is underscored by the fact that the tort-law norm here was found essentially indistinguishable from non-discrimination obligations imposed by federal *statutes*.

Nor is there any basis in statute, treaty, or this Court's decisions on the "implied divestiture" of tribal sovereignty to distinguish between a Tribe's authority to control nonmember conduct through legislative regulation as opposed to common-law rules. Tribes have historically regulated conduct among their people and on their reservations through customs and informal dispute resolution, and codification of those standards has been a comparatively recent phenomenon. It would be perverse to conclude that the Tribes have been divested of their historic common-law authority and retained only the authority to regulate through newfound means.

Petitioner and some of its amici suggest that tribal common-law claims may present a trap for unwary nonmembers. See Pet. Br. 41-44. But this Court has previously "rejected * * * attacks on tribal court jurisdiction" predicated on allegations of "local bias and incompetence," *Iowa Mut.*, 480 U.S. at 18-19, and the facts do not bear out petitioner's concerns. Tribal courts take different forms and draw from varied traditions, but, like the CRST's own courts (Pet. App. A55 n.5, A80), many of them look to federal or state law to govern disputes where no established tribal law applies.[15] Indeed,

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[15] See, *e.g.*, Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 Hous. L. Rev. 701, 739 (2006) (noting tribal law "tends to mirror American laws" because Tribes "must be able to function in the American political system in a seamless manner"); *id.* at 734-735 (discussing tribal-court use of Anglo-American legal constructs and state and federal common law; concluding there is little

when the Cheyenne River Sioux Tribal Court of Appeals recognized the principle of judicial review, it relied not only on Lakota tradition but also on this Court's opinion in *Marbury* v. *Madison*. See *Cohen's Handbook of Federal Indian Law* 274 n.545 (citing *Clemente* v. *LeCompte*, 22 Indian L. Rep. 6111 (Chy. R. Sx. Ct. App. 1994)).

In this case, petitioner cannot plausibly claim it was unfairly exposed to an unusual and unknowable claim. In the tribal court, petitioner had the option of requesting a jury that included nonmembers, and the judge who presided over the trial was a non-Indian law professor. Resp. Br. 13-14, 16. The Chief Justice of the Tribal Court of Appeals was also a non-Indian law professor (and a second member of the three-member panel was a non-Indian). *Id.* at 17. The only "uncertainty" (Pet. Br. 43) about the discrimination claim was the *source* of the obligation not to discriminate; its content so closely paralleled federal antidiscrimination law that petitioner repeatedly argued it was in fact a federal cause of action. See Pet. App. A7, A51, A79. Both federal courts rejected petitioner's suggestion that it had somehow been prejudiced by asserted indeterminacy of tribal law, *id.* at A21-A22, A41-A44, and petitioner has abandoned any claim that the tribal-court proceedings violated due process, Pet. i & n.1.

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evidence that tribal courts are unfair to nonmembers); Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047, 1085 (2005) (finding Navajo common law has been used to provide protections comparable "to those in state courts" even when tribal codes do not).

## II. Tribal-Court Jurisdiction Over Respondent's Discrimination Claim Was Appropriate Under *Montana*'s Exception For Consensual Relationships With Tribal Members

In the absence of any categorical basis for precluding jurisdiction, the tribal courts' jurisdiction turns on application of the *Montana* exceptions. Here, the tribal courts properly exercised jurisdiction in this case over the tort claim arising out of the parties' commercial transactions, because there is a clear nexus between the Indian status of all three respondents and the underlying transactions that gave rise to the tort claim, and other factors demonstrate the "overwhelmingly tribal" nature of the parties' interactions. Pet. App. A11.

1. The first *Montana* exception applies when a nonmember has consented to commercial dealings with the Tribe or its members, thereby submitting to tribal jurisdiction over matters tied to that relationship. See, *e.g.*, *Hicks*, 533 U.S. at 371-372. The dealings between the parties in this case reflect exactly the sort of "consensual relationship" contemplated by *Montana*, and they developed in the "private commercial" context associated with that exception. *Id.* at 372. The course of commercial dealings between the parties was also the basis for the dispute to which tribal antidiscrimination law applied. There was thus a close nexus between the consensual relationship and the Tribe's assertion of jurisdiction. Cf. *Atkinson Trading Co.*, 532 U.S. at 656 ("A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another.").

Petitioner took advantage of the fact that the tribal members possessed majority ownership of the respondent Company to obtain BIA loan guarantees and interest subsidies. J.A. 118-119. When respondents defaulted, the BIA paid off the guarantees. See pp. 6-7 &

note 7, *supra*. In addition to the critical Indian status of respondents, a host of other facts about the parties' course of dealing makes the assertion of tribal jurisdiction appropriate. The subject-matter of the negotiations and resulting contractual arrangements involved a single ranching operation on both tribal and private land within the CRST Reservation; the collateral included cattle and equipment on both tribal and private lands; petitioner had entered the reservation to inspect the Long Company's operations and collateral, and some of the negotiations between the parties took place at tribal offices on the reservation, with the direct assistance of tribal and BIA officials; and the same course of dealing spawned closely related contract claims that were adjudicated in tribal court without objection. See pp. 4-6, *supra*.

Furthermore, petitioner's activities are precisely the type of nonmember conduct that Tribes have a sovereign interest in regulating. See, *e.g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (recognizing Tribe's "general authority, as sovereign, to control economic activity within its jurisdiction").

2. Petitioner argues (Br. 31-32) that the particular contract in the overall arrangement most directly tied to the discrimination claim—the lease of the 2230-acre parcel with an option to purchase that land—was with the Company, which is a South Dakota corporation and thus, in petitioner's view, not a Tribe "member" under *Montana*. But the *Montana* rule and its exceptions come from "an opinion, bear in mind, not a statute," *Hicks*, 533 U.S. at 372, and there is no reason to conclude that a member-owned corporation should be a *non*member for *Montana* purposes—especially when the corporation is (as here) closely held, doing business on the reserva-

tion, and imbued with an Indian identity by virtue of a federal program that is a necessary part of the underlying commercial dealings.

It is not unusual for a corporation to assume an identifying attribute from its owners—especially where the government has a policy interest in treating the company differently in light of its owner's identity. See, *e.g.*, 28 U.S.C. 1603(b)(2) (an entity is an instrumentality of a foreign state for sovereign-immunity purposes when a majority of its shares are "owned by a foreign state or political subdivision thereof"). In fact, in *Pourier* v. *South Dakota Department of Revenue*, 658 N.W.2d 395, 404 (S.D. 2003), vacated in part on other grounds, 674 N.W.2d 314 (S.D. 2004), cert. denied, 541 U.S. 1064 (2005), the Supreme Court of South Dakota held that "a corporation owned by * * * an enrolled tribal member * * * and doing business on the Indian reservation for the benefit of reservation Indians is an enrolled member" for purposes of determining whether "the legal incidence of an excise tax rests on a tribe or on tribal members" under the approach described in *Oklahoma Tax Commission* v. *Chickasaw Nation*, 515 U.S. 450, 459 (1995).

Identifying the corporate respondent in this case as the functional equivalent of a tribal member is strongly supported by the terms and purposes of the Indian Financing Act and its implementing regulations. The BIA loan guarantees were, legally and factually, a *sine qua non* for the repeated loan transactions between the parties here. As described above, see pp. 4-5, *supra*, an "organization of Indians" must have majority-Indian ownership to qualify for federal loan guarantees, which the BIA could have denied had it appeared that respondents could "obtain the loan without a guaranty," 25 C.F.R.

103.16 (1996), since the program is intended to "provide access to private money sources which otherwise would not be available," 25 U.S.C. 1481. The Indian Financing Act's policy of encouraging economic development on reservations, including the development of Indian-owned businesses, would be undermined if such businesses were treated as nonmembers with a limited ability to resolve their disputes in tribal forums.

Petitioner's assertion—that member-owned, state-chartered corporations are always "nonmembers"—would also lead to absurd results inconsistent with the logic of *Montana* itself. For example, a Tribe would obviously have a strong interest in regulating a transaction between two businesses owned by tribal members that operate on the reservation and enter into a contract with each other. See *Merrion*, 455 U.S. at 137. Yet, under petitioner's view, if those businesses happen to be corporations organized under state law, their transaction would be considered one between two *nonmembers* and thus fall beyond the Tribe's jurisdiction in many instances. As the Eighth Circuit recognized, "[t]he Tribe's interest in regulating commercial transactions between its members and nonmembers does not disappear just because a corporation is also a party to those transactions." Pet. App. A12.

3. Some of petitioner's amici (States Amicus Br. 20-22; Association of Am. R.R. Amicus Br. 17-24) suggest that this Court should adopt a heightened standard for establishing tribal-court jurisdiction over nonmembers under the first *Montana* exception, alleging that there is a need for "[s]ymmetry" (States Amicus Br. 21) with the standard used to determine when a Tribe has waived its sovereign immunity from suits in state court. See *C&L Enters., Inc.* v. *Citizen Band Potawatomi Tribe*,

532 U.S. 411, 418 (2001). But there is, of course, no underlying parity between the status of a sovereign and a private party, and declaring symmetry between unequals would vitiate clear federal policy about tribal self-government. See, *e.g.*, 25 U.S.C. 3651(5) and (6).

Amici's suggestion is also inconsistent with the decisions on which the first *Montana* exception is based. In *Morris*, *Buster*, and *Colville*, the non-Indians did not expressly consent to the exercise of tribal jurisdiction (in those cases, jurisdiction to tax). In those cases (as in *Merrion*), the voluntary commercial relationship was itself sufficient to warrant the exercise of tribal authority. Similarly, in *Williams*, the Court held that the on-reservation commercial dealings with a tribal member were sufficient to require the nonmember to submit its contract dispute to tribal court. The same principle applies to petitioner's contractual dealings here.

That conclusion is supported by the established rule that no express consent to jurisdiction is required to subject a private party to suit in state courts. Fair warning of the prospect of such jurisdiction arises from the requisite purposeful contacts with a forum and its citizens, as long as the dispute arises out of those contacts. See generally *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985). In the absence of, for example, a forum-selection clause to the contrary in the contract itself, the same should be true for suits in tribal courts in the limited circumstances where *Montana*'s exceptions apply.

## CONCLUSION

If the Court is ultimately satisfied that petitioner has standing to bring this suit (see note 10, *supra*), the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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# AMICUS CURIAE BRIEF

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In The
# Supreme Court of the United States

PLAINS COMMERCE BANK,

*Petitioner,*

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG, LILA LONG,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

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## INTEREST OF THE AMICUS CURIAE

The American Bankers Association ("ABA") is the principal national trade organization of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States. The outcome of this case will have an impact upon ABA members that transact business on Indian reservations and with Indians who live on reservations.

The South Dakota Bankers Association[1] ("SDBA") is a voluntary association of banks doing business in South Dakota. It has 86 member banks located throughout South Dakota, including numerous banks located on or near one of South Dakota's numerous Indian reservations. SDBA wishes to offer its views on the effect that an expansion of the so-called "*Montana*[2] exceptions" to the general rule that Indian

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[1] The parties have consented to the filing of this brief, and their consent forms have been filed with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae ABA and SDBA, their members or their counsel made a monetary contribution to its preparation or submission. It should be noted that Petitioner is a dues-paying member of both ABA and SDBA, but no special or supplemental dues were paid by Petitioner or any other member to fund the cost of this brief.

[2] *Montana v. United States*, 450 U.S. 544 (1981).

tribes do not have regulatory or civil-adjudicatory jurisdiction over non-members will have on SDBA's members and on the communities (both on-reservation and off) which they serve.

## SUMMARY OF ARGUMENT

Uncertainty as to the rules of the "economic game" leads to reluctance on the part of off-reservation businesses to transact business on Indian reservations or with Indians who live on reservations. This reluctance is understandable given the "special nature of [Indian] tribunals." *Duro v. Reina*, 495 U.S. 676, 693 (1990). An expansion of the *Montana* exceptions to allow tribal courts to exercise civil adjudicatory jurisdiction in circumstances such as those presented in this case will add to that uncertainty and reluctance, the net result of which will be continued economic hardship for those living on and near Indian reservations.

## ARGUMENT

As the current state of our national and world economies demonstrates, a lack of reasonable predictability as to future events is detrimental to the economy in general and to the credit market in particular. Although admittedly on a smaller scale, uncertainty concerning the nature and extent to which tribal courts may exert jurisdiction over non-Indians can

result in similarly injurious consequences to reservation Indians and non-Indians alike. The expansion of the so-called "*Montana* exceptions" to include civil-adjudicatory jurisdiction over non-members will add to that uncertainty and ultimately harm local economic development, both on-reservation and off.

The fact that uncertainty regarding the jurisdictional reach of tribal courts poses potential problems for non-Indians seeking to transact business on a reservation is well-recognized. As Justice Souter noted in his concurrence in *Nevada v. Hicks*, "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals. . . '." 533 U.S. 353, 383 (2001) quoting *Duro v. Reina*, 495 U.S. 676, 693 (1990). This is true because of the uncertainty associated with the varying structure of Indian tribunals, the uncertainty associated with the substantive law they may apply and the varying levels of independence enjoyed by the judges of those tribunals. *Hicks*, 533 U.S. at 384 (Souter, J., concurring). This is also true, at least in part, because non-members generally cannot vote in tribal elections, and thus have no voice in changing procedural rules, substantive law or other matters involving Indian tribunals with which they disagree. *See Duro*, 495 U.S. at 679.

The ultimate "practical consequence" of uncertainty as to the nature and extent of tribal jurisdiction is reluctance on the part of off-reservation businesses to trade on Indian reservations or with

tribal members who live on reservations. ABA and SDBA submit that the primary reason for that reluctance is the difficulty in determining and understanding "the rules of the game." As Justice Souter stated in *Hicks*,

> [t]ribal law is still frequently unwritten, being based instead on the 'values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.' . . . The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' . . . which would be unusually difficult for an outsider to sort out.

*Hicks*, 533 U.S. at 384-85 (Souter, J., concurring) (internal citation omitted).

The confusion resulting from that "complex mix" is evident in the case at bar. For example, Petitioner first attempted to start an eviction action against a state-chartered corporation in state court, but was required to ask the tribal court to order the appropriate tribal officials to serve the process necessary to begin the proceeding. *Plains Commerce Bank v. Long Family Land and Cattle Company*, 491 F.3d 878, 882 (8th Cir. 2007). In the tribal court proceedings that followed, the trial court based its decision on a provision of federal law that had not been pled by either party. *Id.* at 882. The tribal court of appeals then upheld the trial court's decision based on tribal common law. *Id.* at 883. In doing so, the tribal court

of appeals noted that tribal common law includes "Lakota tradition . . . [and] Lakota custom and norms such as the 'traditional Lakota sense of justice, fair play and decency to others.'" *The Bank of Hoven v. Long Family Land and Cattle Company, Inc.*, No. 03-002-A, slip op. at 8 (C.R.S.T. App. Nov. 22, 2004).[3]

Although it is not unusual for an appellate court to affirm the "right decision" made by a lower court, even if made for the "wrong reason," *see, e.g.*, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76 (1990), ABA and SDBA submit that the level of uncertainty regarding applicable decisional law (including the necessary elements of, and defenses to, the claimed wrongdoing) to be applied in this case is disconcerting. Lacking any meaningful decisional guideposts, it is virtually impossible for an outsider to become familiar with Lakota customs and traditions, let alone predict how a particular dispute is likely to be resolved under these customs.[4]

This inability to predict how a tribal court will rule and on what basis is especially apparent with the Cheyenne River Sioux Tribal courts. In *Thorstenson v. Cudmore*, 18 Indian L. Rep. 6051 (C.R.S.T. App.

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[3] Bank of Hoven is now known as Plains Commerce Bank. A copy of the Tribal Court of Appeals Opinion is included in the Appendix to the Petition for Writ of Certiorari at pp. A-45 through A-68.

[4] There is no indication in the record that any testimony was presented from tribal elders or others concerning Lakota customs and traditions as they might be applicable in this case.

1991), the Cheyenne River Sioux Tribal Court of Appeals invalidated a provision of the Tribe's Bylaws that limited tribal jurisdiction over non-Indians on the basis that the Bureau of Indian Affairs had imposed the terms of that provision on the Tribe, and thus the membership had no "meaningful choice" when they voted on the Tribe's Constitution and Bylaws. *Id.* at 6053. Carried to its logical extreme, that line of reasoning could lead to the invalidation of the entirety of the Tribe's Constitution and Bylaws if the Tribal Court of Appeals concluded the membership had no "meaningful choice" when they voted.

ABA's and SDBA's member banks do business on Indian reservations and with tribal members living on reservations.[5] They do so because it presents a business opportunity for them and the communities they serve. However, other businesses in the communities served by ABA's and SDBA's members limit the amount of business they do on-reservation or with tribal members living on the reservations not because of their race, but rather because the risk associated with not knowing the rules before the game begins simply outweighs the potential economic benefit to

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[5] SDBA members operate at least nine main office or branch banks on Indian reservations. Numerous additional banks are located near reservations or on or near "disestablished" or "diminished" reservations. *See DeCoteau v. District County Court*, 420 US 425 (1975) (holding that Lake Traversie Indian Reservation had been "terminated and returned to the public domain").

them[6] and the greater economy, both on-reservation and off-reservation.[7]

The need for more trade with reservation Indians is dramatically demonstrated by a comparison of net income and poverty levels on and off South Dakota's Indian reservations. Bureau of Economic Analysis

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[6] Describing the reasons for the lack of any meaningful flow of capital onto South Dakota's Indian reservations, a 2003 article in the University of South Dakota Business Research Bureau's "South Dakota Business Review," stated that "[w]hat is missing in many cases is very fundamental, that is, the *rule of law.*" Brown & Selk, *Economic Trends on the American Indian Reservations in South Dakota*, 41 S.D. Business Review 4, p. 14 (June 2003) (emphasis added).

[7] This uncertainty is not strictly limited to that relating to the "rules of the game" imposed by Indian tribes. Like the Cheyenne River Sioux Tribe, many of South Dakota's Indian tribes have prohibited the use of so-called self-help repossession. *See Long Family*, 491 F3d at 882. Creditors may use "self-help repossession" elsewhere in South Dakota, S.D. Codified Laws Ann. § 57A-9-609(b), and it is generally available throughout the United States. UCC § 9-609(b). Insofar as certain easily-movable chattels, such as motor vehicles, furniture and appliances are concerned, the use of self-help repossession can greatly reduce the cost of liquidating collateral in the case of default. However, when some banks doing business with Indians living on South Dakota reservations factored the increased cost resulting from the inability to use self-help repossession on Indian reservations into the interest rate charged on loans to reservation Indians, they were subject to complaints of racial discrimination and investigations commenced by the U.S. Department of Justice. *See, e.g., United States v. First National Bank*, No. 96-5035, Consent Decree (D.S.D. May 7, 1997). This sort of "Catch 22" only adds to the uncertainty and the reluctance of off-reservation businesses to trade with Indians living on reservations.

data for 2005 show average per capita income of $21,688.00 and $17,253.00 for the two counties that make up the Cheyenne River Sioux Reservation, while the averages for the three non-reservation counties directly to the east are $30,821.00, $27,248.00 and $39,401.00. The 2005 average per capita income for South Dakota as a whole, on the other hand, was $32,523.00. U.S. Dept. of Commerce, Bureau of Economic Analysis, *available at* http://www.bea.gov/regional/reis/drill.cfm.

According to the 2000 Census, 38.5% of those living on the Cheyenne River Sioux Reservation were at or below the poverty level – nearly three times the 13.2% of South Dakota as a whole. United States Census Bureau, Profile of General Demographic Characteristics: 2000, South Dakota, *available at* http://censtats.census.gov/data/sd/280460605.pdf and United States Census Bureau, Profile of General Demographic Characteristics: 2000, Cheyenne River Reservation and Off-Reservation Trust Land, SD, *available at* http://censtats.census.gov/data/sd/04046.pdf. If one were to remove the Indian reservations from the state-wide average, then the difference would be even more pronounced.

ABA and SDBA respectfully submit that greater certainty concerning the limits of tribal court jurisdiction will help fuel the economic engine, both on-reservation and off. Expanding the *Montana* exceptions to grant tribal courts civil-adjudicatory jurisdiction over non-members will lead to greater uncertainty and thus limit the amount of fuel available to drive that

engine. Limiting the *Montana* exceptions to prohibit the exercise of tribal court adjudicatory jurisdiction over non-members will promote greater certainty and the "sound policy" of greater economic development both on reservations and in the surrounding communities. Accordingly, ABA and SDBA respectfully request that the Court take these important considerations into account when rendering its decision.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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IN THE

# Supreme Court of the United States

PLAINS COMMERCE BANK,
*Petitioner,*

v.

LONG FAMILY LAND & CATTLE CO.,
RONNIE LONG, LILA LONG,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF *AMICUS CURIAE* OF ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE[1]

The Association of American Railroads ("AAR") is a non-profit national trade association whose members include the Nation's major railroads. AAR appears in this case as an *amicus curiae* because its members have a vital interest in ensuring that their property interests and their activities within Indian reservations and across Indian lands are subject to clear jurisdictional rules that will not hinder the railroads' ability to provide efficient and cost-effective interstate rail service. AAR represents its member railroads before courts, agencies, and the United States Congress on matters of common concern to its members. It has filed previous briefs *amicus curiae* before this Court.[2] All parties have consented to AAR's *amicus* participation.

AAR's members include intercity passenger, commuter, and freight railroads. The freight railroad members operate 72 percent of the line-haul mileage,

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[1] This brief was not authored in whole or in part by counsel for either party. No person or entity other than *amicus curiae* or its members has made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Norfolk S. Ry. v. Sorrell*, 127 S.Ct. 799 (2007); *CSX Transp., Inc. v. Georgia State Bd. of Equalization*, 128 S.Ct. 467 (2007); *Norfolk S. Ry. v. Kirby*, 543 U.S. 14 (2004); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001); *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000); *Burlington N. R.R. v. Blackfeet Tribe*, No. 91-545 (U.S. Nov. 1, 1991), *cert. denied*, 505 U.S. 1212 (1992); *S. Pac. Transp. Co. v. Hernandez*, No. 91-293 (1991) *cert. denied*, 502 U.S. 952 (1991); *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987).

employ approximately 92 percent of the workers, and account for approximately 95 percent of the freight revenues of all railroads in the United States. In addition, some AAR member railroads operate on longstanding rights-of-way that cross a number of Indian reservations in the United States, and some of their rail lines also traverse areas located adjacent to Indian reservations, but within areas over which Indian tribes or groups assert civil jurisdiction.

It is critical to AAR members—and indeed, to all businesses in, or considering doing business in, areas potentially subject to tribal jurisdiction—to be able to determine efficiently which sovereign has jurisdiction over their activities and the law that will be applied. The decision below, by concluding that agreements that do not provide clear and unequivocal consent supported tribal court tort jurisdiction against a nonmember and that an unwritten tribal law authorized a substantial civil damage award, injects further risk into an already difficult jurisdictional calculus.

Because railroads may have few choices but to do business in relation to tribal lands or areas (rail lines generally cannot be abandoned without Surface Transportation Board approval), railroads have a particular need to voice their concerns about the decisions rendered below. Unlike banks, which may be able to choose whether to do business with tribes or their members, railroads often have limited options under federal law. The Nation's railroads, as common carriers, are required by federal law to transport interstate freight on their rails upon

reasonable request. *See, e.g.*, 49 U.S.C. § 11101. Rail lines often traverse Indian reservations or other lands on which tribes claim jurisdiction; and, in such circumstances, railroads are essentially required to interact with the Indian tribes to gain access to their rail lines to fulfill their common carrier obligations and to perform maintenance and other federally mandated activities. *See, e.g.*, 49 CFR §§ 213.233-237. Such interaction should not be deemed consent by a railroad to tribal court jurisdiction or the application of tribal laws. America's railroads, therefore, highlight a greater need for clear guidance as to the level of consent required to submit to the jurisdiction of tribal courts.

While this Court's previous decisions seek to limit tribal jurisdiction in reasonable ways, uncertainty regarding the proper scope of tribal jurisdiction over nonmembers under the first exception of *Montana v. United States*, 450 U.S. 544, 565-66 (1981), has made it difficult to determine the proper forum and ascertain the applicable laws, regulatory requirements, and taxes. This uncertainty discourages business investment and economic development in Indian country.[3]

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[3] This brief uses the term "Indian country" in a descriptive rather than legal sense to refer to geographic areas over which tribes assert civil adjudicatory authority and, thus, potentially affect the jurisdictional uncertainty that is the focus of this proceeding. Tribes assert judicial jurisdiction over broad categories of lands, including reservation and non-reservation areas, and member and nonmember-owned lands and rights-of-way, broader categories of lands than are provided by the legal definition of Indian country in 18 U.S.C. § 1151. In any event, the Court has cautioned that the term "Indian country," as

## SUMMARY OF ARGUMENT

As evidenced by the Court of Appeals' decision below, lower courts are misapplying this Court's opinions guiding the determination of the appropriate forum for resolution of disputes arising in Indian country. The Court should clarify the proper scope of tribal court jurisdiction over actions against nonmembers, and simplify the applicable standard in a fashion consistent with precedent, so that the courts, nonmembers, and tribes and their members may predict confidently whether tribal courts have jurisdiction.

Although this Court's recent decisions have sought to clarify the narrow scope of tribal court jurisdiction and bring rationality to dispute resolution in Indian country, its message has often gone unheard by the lower federal courts and some state and tribal courts. The courts below erred. They disregarded the general rule of *Montana v. United States*, 450 U.S. 544, 564 (1981), that tribes lack inherent jurisdiction over nonmembers. They improperly expanded the intended scope of the first *Montana* exception to permit tribal court adjudication of claims against a nonmember without clear consent to that jurisdiction, finding a consensual relationship "of the qualifying kind," *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997),

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defined by 18 U.S.C. § 1151, "simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.5 (2001).

without any indication of express consent to tribal court adjudication or the application of tribal law.

Since Chief Justice John Marshall's early opinions, this Court consistently has premised its relevant jurisdictional standards on the fundamental principles that Indian tribes retained inherent jurisdiction sufficient to govern their internal affairs and tribal governments presumptively lack power over nonmembers. *See, e.g., Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823) (recognizing the "perfect independence" of broader society from tribal governance); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 517, 558-59 (1831) (acknowledging the right of self-government); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (tribes "have power to make their own substantive law in internal matters and to enforce that law in their own forums") (citation omitted). In a corollary principle, the Court has found consent to be a critical component of inherent tribal jurisdiction over nonmembers. *See Duro v. Reina*, 495 U.S. 676, 693 (1990), *superseded by statute*, Indian Civil Rights Act, Pub. L. No. 101-511, Act of Nov. 5, 1990, *as recognized by United States v. Lara*, 541 U.S. 193, 198-99 (2004).

This Court's opinions support a simple and clear rule to define what constitutes a qualifying consensual relationship to establish tribal court jurisdiction: Tribal courts lack inherent jurisdiction over claims against a nonmember absent the nonmember's clear and unequivocal consent to tribal court jurisdiction. Such a rule would ensure that tribal court jurisdiction over nonmembers will be

asserted only based on express agreement and would provide certainty to all concerned. And, such a rule will not undermine the ability of tribes and their members to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

## ARGUMENT

Dispute resolution in Indian country is fraught with uncertainty, leaving tribes, residents, and the business community without guidance to determine jurisdiction efficiently. The question presented here, whether "other means" of tribal regulatory jurisdiction are so broad as to permit tribal adjudicatory jurisdiction over tort claims against nonmembers, exemplifies the current dysfunction. Lower court decisions frequently find a consensual relationship despite facts indicating tribal court jurisdiction either was not contemplated or was affirmatively rejected in the parties' dealings or agreements. Consequently, nonmembers cannot predict confidently whether they may be subject to tribal court jurisdiction and, once there, what law may apply or what rights they may have. The Court should reverse the decisions below and set clear standards that guide parties' and courts' determination of the forum and the law in Indian country. This case presents the opportunity for this Court to clarify that tribal courts may not exercise jurisdiction over claims against nonmembers absent clear and unequivocal consent to tribal court jurisdiction and, if applicable, tribal law.[4]

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[4] This standard is derived from *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S.

## I. THIS COURT SHOULD CLARIFY AND SIMPLIFY *MONTANA*'S TEST TO DETERMINE TRIBAL COURT JURISDICTION OVER NONMEMBERS.

The issue here is whether a qualifying consensual relationship supporting tribal court jurisdiction can be established without clear and unequivocal consent. The Court in *Montana* established an outer boundary of tribal civil authority over nonmembers, holding that unless one of the two *Montana* exceptions is present, tribes lack inherent authority over nonmembers. *Montana v. United States*, 450 U.S. 544, 564-66 (1981). Under the first exception, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565-66 (citation omitted). Under the second exception, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (citation omitted). Unless one of those two exceptions applies, sovereign authority over nonmembers, exercised

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411, 418-19 (2001), which held that an arbitration agreement satisfied the Court's standards for "clear[ly]" and "unequivocally" waiving tribal sovereign immunity. As discussed in Point III., *infra*, the same standards should apply here.

when a tribal court adjudicates disputes involving nonmembers, "cannot survive without express congressional delegation." *Id.* at 564. The first exception is at issue here.

This Court's recent decisions have sought to clarify the narrow scope of tribal court jurisdiction under the *Montana* exceptions and simplify the process by which courts may determine the scope of tribal court jurisdiction. Yet many lower federal courts and tribal and state courts have missed the point. As a result, tribes, tribal members, and nonmember parties embroiled in disputes continue to endure years of litigation just to determine the applicable court and law.

As demonstrated in Point I.A, the two *Montana* exceptions preclude tribal court jurisdiction unless the nonmember has expressly consented. Under Point I.B, below, AAR demonstrates that some federal and state courts continue to find consensual relationships based on transactions or interactions between a nonmember and a tribe or tribal members, notwithstanding the absence of the nonmember's consent. Frequently, they fail to glean the intent of the Court's decisions, *see, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 451-452 (1997), to narrow broad language in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).[5] Resulting decisions, such as the

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[5] The erroneously broad perception of the jurisdiction afforded tribal courts under the consensual relationship exception also has led courts to persist in applying a "general rule of

decision under review here, have stood the presumption *against* tribal court jurisdiction on its head.

### A. This Court's *Montana* Jurisprudence Contemplates Clear Consent As A Condition To Tribal Court Jurisdiction Over Nonmembers.

The Court's cases addressing the scope of the *Montana* exceptions make plain that nonmembers are not subject to tribal court tort claims absent their clear and unequivocal consent to tribal court jurisdiction and tribal law. In *Nevada v. Hicks*, 533 U.S. 353, 361 (2001), the Court reinforced the law

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exhaustion" of tribal court remedies, *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), instead of the "prudential rule" articulated and narrowed in *Strate v. A-1 Contractors*, 520 U.S. 438, 450 (1997) ("In sum, we do not extract from *National Farmers* anything more than a prudential exhaustion rule, in deference to the capacity of tribal courts 'to explain to the parties the precise basis for accepting [or rejecting] jurisdiction.'"). Despite the Court's ruling in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 420 (2001), lower courts have required tribal court exhaustion instead of enforcing contracts requiring arbitration. *See, e.g., Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Mississippi*, 401 F.Supp. 2d 952, 958 (N.D. Iowa 2005) (requiring exhaustion of tribal remedies, despite arbitration clause and agreement that any dispute about arbitrability would be submitted first to a federal court, and relying on *Iowa Mutual* in concluding, "'civil jurisdiction over the activities of non-Indians on reservations [sic] lands presumptively lies in tribal courts, unless affirmatively limited by a specific treaty provision or federal statute'" (citation omitted)).

that tribal jurisdiction over nonmembers "must be connected to that right of the Indians to make their own laws and be governed by them." The Court stated that *Montana's* first exception contemplated a "*private consensual* relationship." *See id.* at 359 n.3 (emphasis in original). Justice Scalia's majority opinion explained *Montana* "was referring to private individuals who *voluntarily submitted themselves* to tribal regulatory jurisdiction by arrangements that they (or their employers) entered into." *Id.* at 372 (emphasis added).

*Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001), also illuminates the Court's first exception analysis, holding a nonmember trader and hotel operator was not required to collect and remit Navajo hotel occupancy tax. Its acquisition of a federal Indian trader license permitting it to transact business within the Navajo Nation did not provide a qualifying consensual relationship. *Id.* at 656-57. "Petitioner cannot be said to have consented to such a tax by virtue of its status as an 'Indian trader.'" *Id.* at 657.[6]

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[6] *Atkinson's* analysis of *Montana's* second exception also is instructive. *Atkinson* rejected tribal taxing power because the hotel operator's drain on tribal resources did not meet *Montana's* standard of being "so severe that it actually 'imperils' the political integrity of the Indian tribe." *Id.* at 657-58 (*quoting Montana*, 450 U.S. at 566).

*Atkinson* and *Nevada* followed the Court's emphasis in *Strate v. A-1 Contractors* on the practical need for the asserted tribal jurisdiction to preserve tribal self-government. *Strate* rejected the notion that tribal court tort jurisdiction could be founded on a subcontract agreement between A-1 and the Three Affiliated Tribes for work to be performed on the reservation. 520 U.S. at 457-58. Although A-1 had a "consensual relationship" with the Tribes, the injured plaintiff was not a party to the contract, and the Court found "no 'consensual relationship' of the qualifying kind." *Id.* at 457. More instructive is Justice Ginsburg's rationale for a unanimous Court, rejecting jurisdiction over a tort action based on *Montana's* second exception:

> Key to its proper application is the [*Montana*] Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them." The *Montana* rule,

> therefore, and not its exceptions, applies to this case.

*Id.* at 459 (citation omitted)(brackets in original). Consequently, the Court held that, since the injured plaintiff might pursue her claim in the state court, "[o]pening the Tribal Court for her optional use is not necessary to protect tribal self-government." *Id.*

A single principal arises from this foundation: A tribal court's assertion of jurisdiction under *Montana* must be founded on the express consent of the nonmember, unless, notwithstanding the availability of state or federal judicial remedies, tribal court jurisdiction over a tort action against a nonmember is necessary to address conduct that imperils tribal internal self-government. A nonmember does not provide the consent required by merely engaging in business dealings with a tribe or tribal member.

### B. Federal, State And Tribal Court Decisions Do Not Comport With *Montana*'s Clear Consent Requirement.

The lower federal courts, state courts, and tribal courts have not followed this Court's law requiring clear consent, creating a minefield of jurisdictional traps for even cautious businesses. Their decisions reflect the need for this Court to clarify and simplify *Montana*'s first exception.[7]

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[7] Nothing underscores more sharply the need to clarify the *Montana* rule than the very recent decision of Judge Charles Kornmann of the United States District Court for the District of

### *1. The Decisions Below Demonstrate The Need To Clarify And Simplify The Consensual Relationship Exception.*

The decisions below exemplify the difficulties businesses face. The Cheyenne River Sioux tribal courts found they had jurisdiction over tort claims against a nonmember defendant that had entered into a contract with a South Dakota corporation, although the contract did not expressly or impliedly consent to tribal court jurisdiction. Indeed, the Bank's contract was not with the Tribe or a tribal member. Rather, the courts below held the tangential facts that the South Dakota corporation

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South Dakota, who entered the trial court decision in this case and plainly seeks guidance from this Court. Reflecting on the Eighth Circuit decision and this Court's issuance of its writ of *certiorari*, Judge Kornmann wrote:

> As I read the appellate opinion, I was struck by the fact that such opinion would clearly and substantially broaden the jurisdiction of tribal courts in the Eighth Circuit. It would allow tribal courts to decide what common law principles were to be applied in tribal courts. This would be a significant expansion of tribal court jurisdiction in civil cases. In the past few days I have noted that the United States Supreme Court has granted the petition of Plains Commerce for a writ of certiorari. Apparently, we will have further guidance from the Supreme Court.

*Farmers Union Oil Co. v. Guggolz*, No. Civ. 07-1004, 2008 U.S. Dist. LEXIS 5338, at *18 (D.S.D. Jan. 24, 2008).

was Indian-owned and the tribal member owners had had prior dealings with the Bank supplied a qualifying consensual relationship sufficient to support tribal court jurisdiction over tort claims against the Bank under the first *Montana* exception. The tribal appellate court found it had jurisdiction to impose a substantial money judgment against a nonmember defendant based on two unwritten Lakota customs that were never mentioned in the tribal trial court and were established solely by the Tribe's argument in a brief *amicus curiae*. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 440 F.Supp. 2d 1070, 1081 (D.S.D. 2006). The federal district and appellate courts affirmed.

By treating tribal courts as capable of imposing tort remedies against nonmembers without their consent, the courts below misperceived this Court's carefully crafted delineation of the scope of tribal powers. The record below disclosed nothing that could be argued to have provided affirmative consent to tribal court jurisdiction. Accordingly, the courts below ignored this Court's guidance to consider whether the conduct alleged to support the consensual relationship reflected consent to tribal court jurisdiction.[8]

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[8] *See Atkinson*, 532 U.S. at 657 ("Petitioner cannot be said to have consented to such a tax by virtue of its status as an 'Indian trader.'"). Nor did the courts below address whether state courts could afford an adequate remedy. *See Strate*, 520 U.S. at 459 (state courts were available for plaintiff's "optional use").

### 2. *In Fashioning Its Standard, This Court Should Consider The Range Of 'Nightmares' That Continue To Arise In Federal, State And Tribal Courts.*

The startling decision in *First Specialty Insurance Corp. v. Confederated Tribes of the Grande Ronde Community of Oregon*, found a consensual relationship despite the parties' stipulation to non-tribal dispute resolution. No. 07-05-KI, 2007 U.S. Dist. LEXIS 82591 at *9-*10 (D. Or. Nov. 2, 2007). This case illustrates the type of "procedural nightmare" the Court's opinion in this case should address. *See National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). In *First Specialty*, the tribes filed securities claims against their financial and investment advisor in state court, even though the relevant agreement provided for arbitration to resolve disputes. 2007 U.S. Dist. LEXIS 82591 at *3. The investment company prevailed in state court, which ruled that all parties were subject to binding arbitration. *Id.* Then, the arbitration panel dismissed the tribes' claims and awarded the investment company $1.4 million in attorneys' fees and costs, plus interest. *Id.* at *3-*4. The tribes then sought to have that award set aside in tribal court. *Id.* at *4. The tribal court vacated the arbitration award. *Id.* The federal district court upheld the tribal court, finding the tribal court had jurisdiction under *Montana*'s first exception, because the contract containing the arbitration agreement and the dealings under that

agreement formed a "consensual relationship" with the Tribe. *Id.* at *9-*10.

Similarly ignoring any consideration of whether the nonmember had expressed consent to tribal court, as compared to a relationship with a tribe or tribal member, is *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2nd Cir. 1997). The court found that a nonmember company that engaged in a course of business dealings with a tribe had a consensual relationship sufficient to subject it to tribal adjudicative jurisdiction, even though no tribal court existed at the time the agreements were formed. *Id.* at 64. There was no contemplation of or consent to tribal court jurisdiction—nor could there have been because the tribe had no tribal court during all but the last three months of the five-year commercial relationship. *Id.* at 63-64. And, without any indication of any relationship consenting to tribal court, the court in *Philip Morris USA Inc. v. King Mountain Tobacco Co.*, No. CV-06-3073-RHW, 2006 U.S. Dist. LEXIS 87181, *11 (E.D. Wash. Dec. 1, 2006), held it was unclear under *Montana* whether Philip Morris's efforts to protect its trademarks by sending cease-and-desist letters to tribal members created a consensual relationship subjecting it to tribal court jurisdiction. Consequently, the court required the company to exhaust tribal court remedies on that question. *Id.*

State court litigants also fall prey to courts' misapprehension of the proper application of *Montana*'s consensual relationship exception. In

*Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana*, 965 So.2d 930, 937 (La. App. 3 Cir. 08/08/07), *cert. granted*, 2007-CC-2256, La. S. Ct. (02/15/2007), a Louisiana Court of Appeal found a "consensual relationship" sufficient to require exhaustion of tribal court remedies based on an agreement expressly requiring that all disputes should be resolved in state, not tribal, court and under state law. It required exhaustion of tribal remedies on the tribe's claims that it had not validly waived sovereign immunity. *Id.* at 937-38.

Such holdings illustrate the need for a clean and simple standard that will guide courts and prevent this range of misapplication of *Montana*'s first exception. The Court should clarify that, if tribal adjudicatory jurisdiction over tort claims against nonmembers can be premised on a consensual relationship, the consent must be clear and unequivocal.

## II. THE PROPER SCOPE OF INHERENT TRIBAL JURISDICTION OVER NON-MEMBERS IS LIMITED; TRIBAL COURT JURISDICTION SHOULD NOT EXTEND TO NONMEMBERS ABSENT CLEAR AND UNEQUIVOCAL CONSENT.

This Court's decisions support the proposition that tribes' dependent status has necessarily divested them of the power to exercise adjudicatory jurisdiction over claims against a nonmember under the first *Montana* exception absent the clear and unequivocal consent of the nonmember.

### A. Historical Conceptions Of Tribal Jurisdiction Reflect That Tribes' Principal Powers Relate To Internal Self-Government.

From the earliest days, tribal power has been grounded in internal self-government. In *Worcester v. Georgia*, Chief Justice John Marshall observed:

> [O]ur history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown, to interfere with the *internal affairs of the Indians* . . . . The king . . . *never intruded into the interior of their affairs, or interfered with their self-government,* so far as respected themselves only.

31 U.S. (6 Pet.) 515, 517 (1832) (emphasis added). Chief Justice Marshall expressed a corollary principle, as well: members of the broader society have "perfect independence" from tribes. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823). From this historical foundation, when recognizing tribal inherent sovereignty, this Court has embraced the bedrock principle that Indian tribes have the "right of internal self-government" and "*the right to prescribe laws applicable to tribe members* and to enforce *those* laws by criminal sanctions." *United*

*States v. Wheeler*, 435 U.S. 313, 322 (1978) (emphasis added) (citations omitted).[9]

The core role of tribal government is to provide self-government for tribal members; tribal governments presumptively lack power over nonmembers. *See Montana v. United States*, 450 U.S. 544, 564-65 (1981) (noting that *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978), relied on "principles [that] support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (explaining that tribes "have power to make their own substantive law *in internal matters* and to enforce that law in their own forums") (emphasis added) (citations omitted).

### B. The Status Of Indian Tribes In Our Federal System Reinforces The Need For Clear And Unequivocal Consent To Tribal Court Jurisdiction Over Nonmembers.

The unique substantive and procedural backdrop against which tribal courts function within the federal system further compels the conclusion

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[9] In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 574, Chief Justice Marshall explained that the effect of discovery and the relationship between the European nations and tribes was that: "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. . . . [their] rights to complete sovereignty, as independent nations, were necessarily diminished . . . ."

that tribes should not have adjudicatory jurisdiction over tort actions against nonmembers absent clear consent. What Justice Kennedy observed in *Duro v. Reina* applies with full force here:

> The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." [F.] Cohen, [HANDBOOK OF FEDERAL INDIAN LAW] 334-335 [(2d ed. 1982)]. It is significant that the Bill of Rights does not apply to Indian tribal governments. *Talton v. Mayes*, 163 U.S. 376 (1896). The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts.

*Duro v. Reina*, 495 U.S. 676, 693 (1990), *superseded by statute*, Indian Civil Rights Act, Pub. L. No. 101-511, Act of Nov. 5, 1990, *as recognized by United States v. Lara*, 541 U.S. 193, 198-99 (2004) (citations

omitted). Although Congress has subsequently enacted criminal legislation in response to *Duro*, and this Court has considered the effect of that legislation in *Lara*, and many tribes are strengthening their tribal courts, the structural concerns Justice Kennedy identified still prejudice nonmember litigants in tribal court.

As *Duro* and *Oliphant* reflect, in analyzing tribal powers, the Court has considered the unique insulation of tribes from fundamental guarantees of fairness otherwise applicable in the federal system, including constitutional protections. *See Oliphant*, 435 U.S. at 194 & nn.3-4 (explaining that the Bill of Rights of the United States Constitution does not apply to tribal governments and the Indian Civil Rights Act provides fewer protections to defendants than are provided in federal or state criminal proceedings). These considerations have led to a complete divestiture of certain tribal powers and narrow limits on others.

Unlike federal and state courts, which must heed the Constitution of the United States, tribal courts are subject to the more limited substantive and procedural requirements of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302. More problematic is that, under the lower federal courts' interpretations of *Santa Clara Pueblo*, the federal courts have neither original jurisdiction over injunctive or declaratory actions against tribal officials under the ICRA, nor review jurisdiction to rectify a deprivation of ICRA rights, even after exhaustion of tribal court procedures. *See, e.g.*,

*Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011-12 (10th Cir. 2007). While a federal court clearly has federal question jurisdiction to determine whether a tribal court had subject matter jurisdiction, *see National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985), the Court's existing case law does not establish lower federal court jurisdiction to examine any other issue.[10] Of course, there is no direct review of tribal court decisions by this Court.

These unique circumstances present unreasonable risks if businesses may be compelled to defend civil tort litigation in tribal court. It is impossible to evaluate risks of a law that one cannot identify with reasonable certainty. Even tribes with substantial written and reported law, like the Navajo Nation, apply unwritten customary or traditional law. Currently, the risk cannot be mitigated by agreement. The Navajo Nation Supreme Court recently relied on unwritten Navajo traditional law, holding, contrary to a ruling of the Ninth Circuit Court of Appeals in *Arizona Public Service Company v. Aspaas*, 77 F.3d 1128, 1135 (9th Cir. 1996), that a 40-year-old lease provision stating that a power plant would not be subject to Navajo regulation is invalid and unenforceable as it relates to tribal employment

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[10] Lower courts are not encouraging on this point. *See AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) ("federal courts may not readjudicate questions—whether of federal, state or tribal law – already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason") (citation omitted).

regulation. *See Thinn v. Navajo Generating Station, Salt River Project*, No. SC-CV-25-06, slip op. at 2, 6-10 (Navajo S. Ct. Oct. 19, 2007).[11]

Businesses facing tort litigation in tribal court are prejudiced because federal review of constitutional and federal rights deprivations arising under the ICRA or other federal laws may be unavailable. Constitutional limitations on the size of tort judgments for punitive damages have warranted much of this Court's attention. *See, e.g., Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S 408 (2003). The lack of impartial review of constitutional rights issues in tort cases also may prejudice nonmembers on issues including the composition of juries and the adequacy of procedure, in addition to the magnitude of judgments.[12]

These concerns counsel against tribal court jurisdiction over tort actions against nonmembers absent clear and unequivocal consent. Given the substantial differences between tribal and federal or state courts, nonmembers should have reasonable assurance they will not inadvertently be subject to tribal, rather than state or federal, courts and law. Requiring a clear and unequivocal consent to tribal court jurisdiction and, if applicable, tribal law, would

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[11] *Available at* http://www.navajocourts.org/index3.htm.

[12] This Court has had occasion to consider a tribal court tort verdict of $250,000,000 entered by an all tribal-member jury against one of AAR's members. *Burlington N. R.R. Co. v. Red Wolf*, 522 U.S. 801 (1997) (vacating and remanding *Burlington N. R.R. Co. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997)).

have the beneficial effect of allowing nonmember businesses, tribes, and tribal members to fashion their agreements to efficiently afford the dispute resolution mechanisms they intend.

## III. THE COURT SHOULD DETERMINE THAT TRIBAL COURTS LACK JURISDICTION OVER CLAIMS AGAINST NONMEMBERS ABSENT CLEAR AND UNEQUIVOCAL CONSENT.

The Court should clarify that the outer limits of tribal court jurisdiction do not encompass the power to exercise jurisdiction over nonmembers without their consent—and that the nonmembers' consent to tribal court jurisdiction must be clear and unequivocal. While such a standard is implied in the Court's decisions from *Worcester*[13] to *Duro*,[14] and from *Montana*[15] to *Atkinson*,[16] clear delineation of such a standard will provide the lower federal courts, and state and tribal courts, needed guidance. Such a standard will ensure that litigation against nonmembers, which sometimes threatens the financial solvency of business and may guide its conduct, will be addressed by a forum that the nonmember has agreed affords acceptable law, procedure, and fundamental safeguards of process and fairness, including access to a federal review of

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[13] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[14] *Duro v. Reina*, 495 U.S. 676 (1990).

[15] *Montana v. United States*, 450 U.S. 544 (1981).

[16] *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

all federal issues.[17] This standard would ensure that agreements between tribes, tribal members, and nonmembers waiving tribal sovereign immunity or consenting to tribal court jurisdiction receive the same level of scrutiny. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S 411, 418-419 (2001).

Holding that tribes lack adjudicatory jurisdiction over claims against nonmembers absent clear and unequivocal consent in no way infringes upon retained, inherent tribal rights or denies the tribe its ability to vindicate its rights. Already, the Court has recognized that the inherent limitations on tribal jurisdiction over nonmembers may prohibit tribes from independently enforcing regulations against nonmembers in tribal courts of law. *See, e.g., Montana*, 450 U.S. at 566 n.14 ("By denying the Suquamish Indian Tribe criminal jurisdiction over non-Indians, however, the *Oliphant* case would seriously restrict the ability of a tribe to enforce any purported regulation of non-Indian hunters and fishermen."). But tribal self-government does not require an expansion of tribal court jurisdiction over nonmembers to redress this perceived problem.

Other remedies are available to tribes and their members, such as the state and federal courts in which tribes, tribal members, and nonmembers are

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[17] Moreover, requiring clear and unequivocal consent may encourage tribes and business communities to work together to develop defined procedures and laws that will enable tribes and tribal courts to both protect tribal interests and attract economic development to reservations.

afforded the full panoply of federal protections. Federal and state courts provide adequate forums for addressing tribal and nonmember rights. *See Nevada v. Hicks*, 533 U.S. 353, 373 (2001) ("the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- and state-law rights"); *Strate v. A-1 Contractors,* 520 U.S. 438, 459 (1997) (noting state courts were available for the petitioner's "optional use").

Tribal court jurisdiction exists primarily for the purpose of enabling tribes to make and enforce their own law in internal matters. *See Duro*, 495 U.S. at 694; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). As the Cheyenne River Sioux Court of Appeals demonstrated in the case below, tribal courts find and apply tribal laws including unwritten customary law. *See Plains Commerce Bank v. Long Family Land & Cattle Co.,* No. 03-022-A, slip op. at 8 (Sioux Tribal Ct. App. Nov. 22, 2004), App. to Petition at A-54. That power would remain unhindered by the standard *amicus* advances. However, where nonmembers and tribes interface, a tribal court—whose laws are often unknown, difficult, or impossible for nonmembers to ascertain, and may even directly contradict the pronouncements of this Court[18]—is not the forum in which nonmembers

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[18] *See Hoover v. Colville Confederated Tribes*, 3 CTCR 43, 6 CCAR 16 (Colville Confederated Ct. App. Mar. 18, 2002) ("The United States Supreme Court has clearly stated that, aside from the *Montana* exceptions, Indian tribes may regulate non-member activities on reservations only when Congress has

should be compelled to defend litigation. Other forums exist for those purposes, established by governments with a political process in which tribes, their members, and nonmembers may participate. The Court should provide needed clarification, and rule that *Montana*'s first exception cannot be read to afford tribal court jurisdiction over private tort claims against a nonmember without clear and unequivocal consent to tribal court jurisdiction.

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

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explicitly granted the tribes explicit authority to do so. We believe this approach unduly restrictive because it ignores the clear reality of circumstantial evidence."). *Available at* http://www.tribalresourcecenter.org/legal/opfolder/default.asp.

# AMICUS CURIAE BRIEF

No. 07-411

# In the Supreme Court of the United States

PLAINS COMMERCE BANK, PETITIONER,

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., ET AL.,
RESPONDENTS.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE EIGHTH CIRCUIT*

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## INTEREST OF THE *AMICUS CURIAE* [1]

The Cheyenne River Sioux Tribe ("the Tribe" or "CRST") is a federally recognized Indian tribe and signatory to the Treaty with the Sioux, 15 Stat. 635 (Apr. 29, 1868). The tribal Constitution establishes a tribal court "for the adjudication of claims or disputes arising among or affecting the Cheyenne River Sioux Tribe." Constitution of the Cheyenne River Sioux Tribe, Art. IV, § 1(k) (1935) ("CRST Const."), *amended by* Bylaws of the Cheyenne River Sioux Tribe, Art. V, § 1(c) (1992) ("[t]he tribal courts shall have jurisdiction over claims and disputes arising on the reservation"). CRST courts are open to tribal members and non-members alike. *See also* pages 26-31, *infra*.

The Cheyenne River Sioux Tribe has a direct and immediate interest in this case. The question presented concerns the civil adjudicatory jurisdiction of the Tribe's court. Furthermore, the underlying dispute arises from a contractual relationship between petitioner Plains Commerce Bank (the "Bank"), which does significant business with members of the Tribe on the Cheyenne River Indian Reservation (the "Reservation"), and respondent Long Family Land and Cattle Company, an entity owned and operated by CRST members –

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[1] Petitioner and respondents have filed a blanket consent with the Clerk. Pursuant to S. Ct. R. 37.6, *amicus* Tribe states that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

respondents Ronnie and Lila Long (the "Longs"). In particular, that dispute involves land located wholly within the Tribe's Reservation and affects the financial interests of tribal members who live and make their living on the Reservation. These are matters in which the Tribe has a significant interest. *See* CRST Const., Art. I (the territorial jurisdiction of the Tribe extends to "the territory within the original confines of the diminished reservation boundaries"); *id.*, Art. IV, § 1(b) (the Cheyenne River Sioux Tribal Council has authority to "assist members of the tribe in presenting their claims and grievances before any court or agency of government"). Finally, the claim at issue, sustained by the jury in the tribal court, charges discrimination by the Bank against tribal members based on their status as Native Americans.

In these circumstances, the Tribe has a substantial interest in presenting its views to the Court in this case.

## STATEMENT

The Court previously has considered the history of the Cheyenne River Sioux Tribe and its treaty relationship with the United States. *See South Dakota v. Bourland*, 508 U.S. 679 (1993); *Solem v. Bartlett*, 465 U.S. 463 (1984); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). We briefly recount that history to put this case in proper context.

The Cheyenne River Sioux Tribe is a federally recognized Indian tribe and signatory to the Treaty with the Sioux, 15 Stat. 635 (Apr. 29, 1868) (the "Fort Laramie Treaty"). The Tribe comprises four of the seven bands

of the Lakota Sioux – Minnecoujou, Itazapco, Oohenumpa, and Siha Sapa. It has approximately 16,000 enrolled members, a majority of whom live on the Reservation in 16 tribal communities located throughout Ziebach and Dewey counties in north-central South Dakota. The Reservation constitutes approximately 2.8 million acres of land, which is approximately the size of the State of Connecticut. Of this, some 1.6 million acres are held in trust for the benefit of the Tribe or tribal members or held by individual members in fee.[2]

The United States entered into the Fort Laramie Treaty with the seven bands of the Lakota Sioux, including what is now known as *amicus* Cheyenne River Sioux Tribe. The Fort Laramie Treaty reserved for the seven bands of the Lakota Sioux the lands within the Great Sioux Reservation along the Missouri River and is considered the seminal treaty among a series of treaties in which the United States pledged to preserve portions of the Sioux Tribes' original territory for their exclusive use in exchange for peace.[3]

Beginning with the Fort Laramie Treaty in 1868 through the 1880s, the relationship between the United States and the Sioux increasingly reflected the federal government's desire to rid itself of the reservation system, assimilate Indians into the general population,

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[2] *See* CRST Const., Art. VIII, § 2; *South Dakota v. Bourland*, 508 U.S. at 682.

[3] *See United States v. Sioux Nation of Indians*, 448 U.S. at 374-77 & nn.1, 4 (1980) (describing the 1851 treaty setting aside lands for individual Sioux tribes and the events leading up to and the results of the 1868 treaty).

and extinguish the treaty relationship with Indian tribes.[4] The Fort Laramie Treaty, like subsequent treaties, consequently included provisions that promised to provide Indians with the necessary lands, tools, and materials to assist the Indians in becoming "civilized" farmers.[5]

It soon became clear, however, that the ultimate goal of federal policy was to transfer the remaining reservation lands from tribes to non-Indians. In 1887, Congress passed the General Allotment Act, 24 Stat. 388, which divided reserved lands into individual Indian ownership and opened the remaining "surplus" lands for sale to non-Indian settlers.[6]

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[4] *See Montana v. United States*, 450 U.S. 544, 559 n.9 (1981). *See generally* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 76-84 (2005 ed. & Supp. 2007) (examining the "civilization and assimilation" federal Indian policy of the period from 1871-1928).

[5] *See* 15 Stat. 635, Art. 2 (reserving the Great Sioux Reservation "for the absolute and undisturbed use and occupation of the Indians herein named"); Art. 3 (promising that additional "arable" land would be provided upon showing of "a very considerable number of [Indians who are] disposed to commence cultivating the soil as farmers"); Art. 6 (authorizing "heads of families" to select lands for farming but conditioning use and occupation of such lands "so long as he or they may continue to cultivate it"); Art. 8 (promising that the United States would provide a farmer in order to teach Indians how to farm and further obligating that when more than 100 Indians became farmers, another blacksmith would be provided); Art. 10 (obligating the United States to provide "one good American cow" and "one good well broken pair of American oxen" to each Indian family after settlement on the reservation); Art. 14 (promising $500 in gifts per year for three years after the date of signing to the ten Indians who "in the judgment of the [U.S.] agent may grow the most valuable crops for the respective year").

[6] *See* Cohen, § 1.04, at 77.

Two years later, the Great Sioux Reservation was divided into several reservations among the signatories to the Fort Laramie Treaty by the Act of March 2, 1889, 25 Stat. 889 ("1889 Act").[7] The 1889 Act opened up nine million "surplus" acres of the Great Sioux Reservation to non-Indian settlement.[8] Significantly for the present case, the 1889 Act also allotted some land to individual Indians for the express purpose of promoting farming and agricultural pursuits.[9]

Thus, from the outset, the Tribe's Reservation was established, in accordance with federal policy, to cultivate an agrarian economy on individual Indian-owned parcels of land. To this day, the Reservation continues to depend on an agrarian-based economy, primarily cattle ranching, farming, and haying. Indeed, the Tribe's Constitution expressly recognizes the importance of regulating and controlling economic activity on tribal lands, which remain the Reservation economy's largest and most profitable resource. CRST Const., Art. IV, § 1(c).[10]

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[7] The 1889 Act established the Pine Ridge, Rosebud, Standing Rock, Cheyenne River, Lower Brule, and Crow Creek Sioux Reservations.

[8] The crush of non-Indians seeking to settle the area further led to the passage of the Act of May 29, 1908, 35 Stat. 460, which opened up 1.6 million "surplus," unallotted acres of the Tribe's Reservation for homesteading by non-Indians. *South Dakota v. Bourland*, 508 U.S. at 682-83; *Bartlett*, 465 U.S. at 467 & n.6.

[9] *See Solem v. Bartlett*, 465 U.S. at 466-67 & n.5.

[10] The CRST Tribal Council's powers include authority

> to approve or veto any sale, disposition, lease or encumbrance or tribal lands, interests in land or

(Cont'd)

*See generally* Indian Reorganization Act (the "IRA"), 25 U.S.C. §§ 461, 469-70 (2000) (encouraging economic development through Indian-chartered corporations); Cohen, § 1.05, at 84-89 (explaining that for the first time in United States history of federal policy toward Indian tribes, the IRA encouraged tribal economic development and self-determination). The importance of these lands to both the Tribe and the federal government is demonstrated by the fact that business related to ranching normally includes, and sometimes requires, approval from both the Tribe and the Bureau of Indian Affairs.[11]

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(Cont'd)

> other tribal assets which may be authorized or executed by the Secretary of the Interior . . . provided that no tribal lands shall ever be sold . . . [t]ribal lands may not be encumbered or leased for a period exceeding five years [with certain exceptions].

CRST Const., Art. IV, § 1(c) (adopting, in relevant part, the Indian Reorganization Act, 25 U.S.C. § 476(e) (2000)).

[11] *See* CRST Ordinance No. 71 (2003) (Grazing Ordinance) (providing a comprehensive set of regulations pertaining to the leasing, management, and tribal oversight of rangeland activity on tribal trust and member-owned fee lands); 25 C.F.R. Part 166 (grazing permits). *See also* CRST Const., Art. VIII, § 3 (authorizing leasing of tribal lands for "business purposes," including grazing); *id.*, Art. IV, § 1(m) (tribal council's authorities include promoting the "public welfare by regulating the use and disposition of property of members of the tribe"); CRST Bylaws, Art. IV, § 11 (lease records "pertaining to lands of any nature on the reservation" to be maintained by tribal council); LAW & ORDER CODE OF THE CHEYENNE RIVER SIOUX TRIBE ("C.R.C.") § 10-2-6(6) (1978), as amended (landlord remedies for holdover occupancy by tenant of agricultural land).

Finally, federally recognized Indian tribes are sovereign political entities that possess inherent sovereign authority. *See, e.g., United States v. Lara*, 541 U.S. 193, 199 (2004); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973) ("[Indian tribes'] claim to sovereignty long predates that of our own Government") (citations omitted); *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations"); Cohen, § 4.01[1][a], at 205 ("Indian tribes consistently have been recognized, first by the European nation, and later by the United States, as 'distinct, independent political communities,' qualified to exercise powers of self-government . . . by reason of their original tribal sovereignty") (internal citations omitted). The Tribe enjoys a government-to-government relationship with the United States and the State of South Dakota. It exercises its power of self-government by, among other things, entering into cooperative agreements with the South Dakota Department of Revenue. These agreements provide for the State to administer and collect both the state sales taxes and parallel tribal taxes identical to the state taxes on sales of cigarettes and tobacco products to non-members on the Reservation, gross receipt taxes on visitor-related businesses, use taxes, contractors' excise taxes, alternate contractors' taxes, amusement device taxes, and fuel excise taxes. As such, they evidence good faith in dealing and mutual respect between two sovereigns whose jurisdictions are, at times, in tension. *See, e.g., Cheyenne River Sioux Tribe v. South Dakota*, 105 F.3d 1552 (8th Cir.), *cert. denied*, 522 U.S. 981 (1997) (CRST successfully challenged imposition of state motor vehicle excise tax

and registration fee on Indians who reside within reservation boundaries). *See also, e.g., Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017 (8th Cir.), *cert. denied*, 522 U.S. 816 (1997) (Lower Brule Sioux Tribe's challenge to imposition of state hunting and fishing laws on fee lands located within reservation boundaries).

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's precedents establish that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana v. United States*, 450 U.S. at 565. Since *Montana*, none of this Court's decisions has retreated from, let alone overruled, this bedrock principle. It is only by ignoring, and indeed belittling, the settled doctrine of retained tribal sovereignty that the Bank can urge reversal of the judgment below. *See, e.g.*, Pet. Br. 44 ("there are no compelling reasons requiring a nonmember defendant to defend itself in tribal court against a tort claim brought by a tribal member").[12]

Under what has come to be called the first *Montana* exception, a tribe has authority over a nonmember where the nonmember has undertaken a "consensual relationship" with a tribe or its members:

> A tribe may regulate, through taxation, licensing, or other means, the activities of

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[12] For the reasons stated in respondents' brief, *amicus* Tribe also agrees that this Court is deprived of jurisdiction because the Bank lacks standing and that in any event the writ should be dismissed as improvidently granted.

> nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

*Montana*, 450 U.S. at 565. The *Montana* analysis applies to a tribe's adjudicatory jurisdiction as well as its regulatory authority. *See, e.g., Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 652 (2001) (the Court has "held that *Montana* govern[s] tribal assertions of adjudicatory authority over non-Indian fee land within a reservation"); *Strate v. A-1 Contractors*, 520 U.S. 438, 451-52 (1997).

For purposes of the first *Montana* exception, the question is whether the nonmember has voluntarily entered into a consensual relationship with the member. In that event, a tribe's retained inherent sovereignty extends to regulation of that relationship and to adjudication of disputes arising out of that relationship, and the nonmember reasonably submits itself to that essential sovereign authority of the tribe. *See, e.g., Nevada v. Hicks*, 533 U.S. 353, 372 (2001) (the first *Montana* exception "was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they . . . entered into"); *Atkinson Trading Co.*, 532 U.S. at 653 ("'a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe'") (citation omitted); *Strate*, 520 U.S. at 446 ("[t]he first exception relates to nonmembers who enter consensual relationships with the tribe or its

members"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982) (tribe may exercise authority over nonmember when "the nonmember enters the tribal jurisdiction" by "enter[ing] tribal lands or conduct[ing] business with the tribe"); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (recognizing "tribal power to tax non-Indians entering the reservation to engage in economic activity").[13]

The Tribe has significant governmental interests, recognized by federal Indian policy, in regulating the economic relationships of its members with nonmembers, particularly when those relationships affect the Reservation economy as they did here. The Tribe's general interest as a government in regulating such relationships is reinforced by the facts of this case – that the Bank is a frequent lender on the Reservation to members and member-owned companies through loans guaranteed by the Bureau of Indian Affairs. Finally, holding the Bank responsible in tribal courts for

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[13] As respondents demonstrate, the land in question in this case consisted of both Indian trust land leased to Ronnie Long and fee-simple land initially owned by tribal member Maxine Long and her husband Kenneth Long (parents of respondent Ronnie Long). For this reason, the Bank's insistence that the case involves only land owned in fee by a nonmember is incorrect. For purposes of this *amicus* brief, however, the Tribe addresses the Bank's argument on its own terms. Of course, "[t]he ownership status of land . . . is only one factor to consider"; contrary to the Bank's assertion, and for the reasons stated below, it is not "a dispositive factor" in this case. *Nevada v. Hicks*, 533 U.S. at 360.

its discriminatory practices against tribal members is an appropriate and fair means of exercising the Tribe's inherent retained sovereign authority.[14]

## ARGUMENT

## THE TRIBAL COURT HAD JURISDICTION OVER THE CLAIM THAT THE BANK ENGAGED IN DISCRIMINATION AGAINST TRIBAL MEMBERS ARISING OUT OF THE BANK'S CONTRACTUAL RELATIONSHIP WITH A MEMBER-OWNED CORPORATION.

### I. THE CHEYENNE RIVER SIOUX TRIBAL COURT'S JURISDICTION IN THIS CASE RESTED ON THE TRIBE'S SUBSTANTIAL GOVERNMENTAL INTERESTS IN THE CONSENSUAL ECONOMIC RELATIONSHIP BETWEEN THE PARTIES.

As the Eighth Circuit correctly recognized below, "[a]t its heart the *Montana* inquiry is about tribal interests and tribal self government." Pet. App. A12. *See also, e.g., Brendale v. Confederated Tribes and*

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[14] *Montana* also has a second exception recognizing that a tribe "also retain[s] inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. Much of the following discussion also applies to the *Montana* second exception. However, because the Eighth Circuit did not reach the second exception (*see* Pet. App. A14 n.7), this brief focuses on the first exception.

*Bands of the Yakima Indian Nation*, 492 U.S. 408, 429 n.11 (1989) (opinion of White, J.) (issue is whether there is a tribal "interest sufficient 'to justify tribal regulation'"); *id.* at 444 (opinion of Stevens, J.) ("important tribal interests"); *id.* at 457 (opinion of Blackmun, J.) ("significant tribal interest"); *Coleville Tribe*, 447 U.S. at 153 ("significant [tribal] interest in the subject matter"). Here, there can be no doubt that the Tribe has substantial and legitimate governmental interests in the consensual relationship between the Bank and the Indian-owned Long Company that gave rise to the Longs' claim of discrimination.

### A. The Tribe Has Significant Interests In This Case.

The Tribe has significant interests that are directly implicated in this case. To begin with, the Tribe has a strong interest in the economic relationships of its members with nonmembers. Indeed, the welfare and well-being of its citizens is one of the most fundamental interests any governmental entity can have. Thus, where a nonmember voluntarily undertakes a commercial relationship with a member, a tribe has a significant interest.[15]

The present case, however, involves much more than this general tribal interest. For example, even accepting for purposes of argument that the land was owned in fee

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[15] This interest is recognized in the legal doctrines of both long-arm jurisdiction and conflicts of law. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-75 (1985); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); RESTATEMENT (SECOND) OF CONFLICT OF LAW §§ 36-37 (1971).

by nonmembers (*see* page 10 note 13, *supra*), the land nonetheless is part of the CRST Reservation and thus its status and title remain of considerable interest to the Tribe. The Tribe's LEASEHOLD MORTGAGE FORECLOSURE CODE, §§ 3-1 *et seq.* (1996) (foreclosure proceedings), LANDLORD TENANT CODE, § 2 (1996) (rights and responsibilities of landlords and tenants, remedies), § 3 (eviction, notice to quit possession), and THE CHEYENNE RIVER SIOUX TRIBE LAW AND ORDER CODE (1978), as amended ("C.R.C."), Title X, §§ 10-1-1 *et seq.* (foreclosures of secured obligations), 10-2-1 to 10-2-8 (actions to recover possession of real property) reflect this interest and provide a comprehensive regulatory scheme for parties engaged in real-property transactions on lands within the Reservation.

Apart from its interest in the status of the land, the Tribe has an economic interest in ensuring and protecting its economic security and that of its members. The tribal economy depends on cattle ranching, farming, and haying.[16] Here, the Longs leased a tribal grazing unit – *i.e.*, land held in trust for the Tribe and designated by the Tribe for the specific purpose of grazing cattle – so that their cattle could graze near the site of the Long Company's operations. The Tribe regularly leases its trust lands for the purpose of cattle ranching and grazing, usually to individual tribal members but also to non-Indians and non-Indian businesses, as a major

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[16] According to the United States Department of Agriculture, approximately 93 percent of the Reservation lands are permitted for agricultural use, including farming, cattle ranching, and haying. *See* U.S. Dept. of Agriculture, National Agricultural Statistics Services, *available at* http://www.fedstats.gov. *See generally* Cohen, § 15.01, at 965 (range and grazing lands account for 44 million acres of the 55.4 million acres of land held in trust for Indian tribes throughout the United States).

means of tribal revenue. Moreover, the Longs mortgaged their home and the fee land upon which they operated their business on the Reservation in order to guarantee the debt of the Company and, as added security for the loans at issue, pledged their personal interests as well.

In addition, Kenneth Long intended to and did bequeath his interest in the land he owned to his son Ronnie Long. Absent the Bank's breach of contract and wrongful discrimination, the land therefore would have returned to ownership by a tribal member – a result that would have furthered the federal policy of restoring the tribal land base by returning lands to ownership by tribes or their members. *See* Indian Reorganization Act, 25 U.S.C. §§ 461, 463(a) (2000) (authorizing Secretary of the Interior to restore to tribal ownership lands opened or authorized to be opened to sale to non-Indians), 488 (authorizing agricultural loans to tribes for the purpose of acquiring fee lands within their reservations); *see generally* Cohen, § 1.05, at 86-89. A clearer or more important tribal interest is hard to imagine.

That tribal interest, moreover, is reflected in federal Indian policy. The Tribe's inherent authority to regulate on-Reservation activity that adversely affects the livelihood of its members and the health of the agricultural-based Reservation economy is crucial to its federally recognized right to self-government and self-determination. *See generally* President Nixon, Special Message on Indian Affairs, 1970 PUB. PAPERS 564 (July 8, 1970); Indian Self Determination and Education Assistance Act, 25 U.S.C. §§ 450, 450a (2000); American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701 *et seq.* (2000); *White Mountain Apache*

*Tribe v. Bracker*, 448 U.S. 136, 143-44 & n.10 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 138 n.5 (citing *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 155).

These tribal interests are further reinforced by two considerations central to this case. First, the Bank is not only a current lender to the Tribe[17] but also a frequent lender to tribal members in connection with land on the Reservation. *See, e.g., Bank of Hoven v. Director Office of Economic Development*, 34 I.B.I.A. 206 (2000) (Bank sought 90 percent guaranty of $500,000 loan to majority Indian-owned cattle company); *River Bottom Cattle Co., Inc. v. Acting Aberdeen Area Director*, 25 I.B.I.A. 110 (1994) (Bank sought 80 percent guaranty of $410,040 loan to majority Indian-owned cattle company); *Netterville v. Aberdeen Area Director*, 24 I.B.I.A. 52 (1993) (agricultural loan from the Bank of Hoven to individual Indian).

Second, the loans in question were guaranteed by the Bureau of Indian Affairs (the "BIA") under the BIA Loan Guaranty Program, 25 C.F.R. Part 103 (2007). The BIA Loan Guaranty Program is authorized under the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.* (2000), as amended, and permits the BIA to insure loans made by approved lenders to businesses that are majority-owned and operated by Indians. *See* 25 C.F.R. §§ 103.2, 103.25(a)-(b).[18] The Program implements the federal policy of

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[17] The Tribe has a $750,000 loan with the Bank in connection with its investment in an on-Reservation motel. It also has a certificate of deposit with the Bank in the amount of $65,000.

[18] The Indian borrower must have at least 20 percent equity in the business being financed in order to secure a BIA guaranteed loan. 25 C.F.R. § 103.7.

providing capital to develop Indian resources, such as the cattle ranching and haying in the instant case, so that Indians "will fully exercise responsibility for the utilization and management of their own resources" and thereby realize "a standard of living . . . comparable to that enjoyed by non-Indians in neighboring communities." 25 U.S.C. § 1451 (2000) (congressional declaration of policy); 25 C.F.R. § 103.2 (purpose of the Program is to "encourage eligible borrowers to develop viable Indian businesses through conventional lender financing"). *See also* American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701 *et seq.* (2000).

By thus benefiting the Tribe and its members, the BIA Loan Guaranty Program is critically important to the overall Reservation economy that the Tribe is constitutionally charged with regulating. CRST Const., Art. IV, §§ 1(c), (e)-(g), (l)-(n); Art. VIII, §§ 1-13 ("Land"). The Tribe's role in securing a robust and healthy Reservation economy is a key element of its sovereign authority to govern its members and encourage on-Reservation business opportunities for the benefit of all Reservation residents. *See, e.g.*, 25 U.S.C. § 450a(a)-(b) (2000) (federal policy recognizes the power of tribal self-government and provides assistance to Indian tribes in the development of reservation economies); 25 U.S.C. § 1521 (2000) (the purpose of the Indian Business Development Program is "to establish and expand profit-making Indian-owned economic enterprises"). Accordingly, the Bank's wrongful conduct here will have broad implications for tribal borrowers, for the economic vitality of the Reservation, and for the relationship between the BIA and the Tribe and its members.

Finally, the Tribe, like other sovereigns, has a paramount governmental interest in protecting its members from (or ensuring that they are compensated for) the evil of discrimination based on their status as Indians. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 592, 604 (1983) ("there can no longer be any doubt that racial discrimination . . . violates deeply and widely accepted views of elementary justice," and the United States has a "fundamental, overriding interest in eradicating racial discrimination"). As the Eighth Circuit recognized below, the Tribe is entitled "to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members." Pet. App. A13.

It is an unfortunate but still all-too-common occurrence for Indians living on reservations to experience racial discrimination. They often are victimized by the predatory lending practices of local banks that seek to exploit the disadvantages of reservation economies compared to those of neighboring communities. *See, e.g., Bone Shirt v. Hazeltine*, 336 F.Supp.2d 976, 1031 (D.S.D. 2004) ("Indians in South Dakota have also been subject to discrimination in lending"), *aff'd*, 461 F.3d 1011 (8th Cir. 2006). Such practices have been investigated by the U.S. Department of Justice on behalf of American Indians in South Dakota and determined to be actionable. *See* Consent Decree in *United States v. Blackpipe State Bank*, Civ. A. No. 93-5115 (D.S.D. Jan. 21, 1994) (alleging that South Dakota bank engaged in discriminatory lending practices through a policy of refusing to make loans to Indians that would be subject to tribal-court jurisdiction and

charging higher interest rates to Indians as compared to similarly situated non-Indian borrowers).[19]

Indeed, the Bank and other lenders have not only discriminated against tribes and their members, but also

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[19] *See also, e.g.*, Report, First Nations Development Institute, *Predatory Lending in Native American Communities* (May 2003), *available at* http://www.firstnations.org (concluding that predatory lending practices by banks doing business in Indian Country, including among tribes in South Dakota, pose significant problems especially among Native communities that are "isolated" and therefore have "less financial options," and reporting stereotyping and racism against Native Americans as hurdles to good-faith practice among lenders); Report, First Nations Development Institute, *Borrowing Trouble: Predatory Lending in Native American Communities* (2008) *available at* http://www.firstnations.org (updating and expanding 2003 report, including data on Native borrowers' limited experience with traditional banks); Report, National Community Reinvestment Coalition and the National American Indian Housing Council, *High Cost Lending on Indian Reservations – Watch Out if You are Buying a Home: A Survey Report and Data Analysis by NAIHC and NCRC* (June 2003), *available at* http://www.naihc.net (reporting that "the incidence of predatory lending is greater in states, [including South Dakota,] where high cost lenders have their greatest share of the market to Native Americans . . . relative to whites" and that discrimination on the basis of race is often cited by Native American borrowers who are offered higher interest rates even though they qualify for lower rates). *See generally* Report, William C. Apgar and Allegra Calder, Joint Center for Housing Studies, Harvard University, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, in *The Geography of Opportunity: Race and Housing Choice in Metropolitan America* (Brookings Institute Press 2005) (reporting that the sub-prime lending market targets minorities and prevents equal access to prime mortgages).

have threatened to withhold loans from CRST members on the Reservation. In its oral argument before the Tribal Court of Appeals in this case, the Bank stated:

> That's why I'm concerned, not just for the bank, the bank has got the money to pay the judgment, your Honors. What I'm concerned with, is that this bank is not acting on its own. There are a number of banks around that are looking at this case, not just this Tribe; there are a number of banks around. *And let me tell you, if they want to discriminate against tribal members, they can do it and get by with it. They can. They don't have to make everybody loans. They can find a reason for rejecting the loans.*

CRST Ct. App. Tr. at 114 (Oct. 6, 2004) (emphasis added). The CRST Appellate Court rightly rebuffed this threat:

> Unfortunately, a final concern must be addressed. In his concluding summation to this Court, counsel for the Bank stated that a lot of banks and lenders were watching this case. While it seemed jarring and inappropriate at the time, it is even more so upon reflection. It is difficult to see the statement as merely some form of artless advocacy, but rather more as some kind of threat impugning the integrity of the Cheyenne River Sioux Tribe's judicial system, which this Court finds most offensive and unprofessional. Such statements must not be made again. Though it hardly needs repeating, the Court restates its commitment

> to fair play, the rule of law, and cultural respect for *all* parties who appear in the courts of the Cheyenne River Sioux Tribe.

Pet. App. A67-A68, 32 Indian L. Rep. 6001, 6006 (CRST Ct. App. 2004). Such threats and discrimination undeniably implicate a tribal sovereign interest of the highest order.

### B. The Bank's Arguments Do Not Negate The Tribe's Interests In This Case.

In the face of the foregoing considerations supporting tribal authority, the Bank's responses plainly are insufficient to deprive the tribal court of jurisdiction under the first *Montana* exception.

The Bank principally relies on the formal argument that the Long Company was not itself a member of the Tribe but merely a nonmember South Dakota corporation. This argument simply blinks reality. As the Eighth Circuit recognized, it falls far short of defeating the Tribe's substantial and legitimate interests in this case. *See* Pet. App. A9-A11.[20]

First of all, the Long Company was – and, under its articles of incorporation, was required to be – majority-owned by CRST members. Thus, the company's Indian-related nature was inherent in its existence notwithstanding incorporation under South Dakota law.

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[20] CRST law has no provision for the formation of a non-governmental corporation.

Furthermore, the Long Company was structured in this way for Indian-related reasons. In particular, majority ownership by tribal members is a requirement for the BIA Loan Guarantee Program. *See* 25 C.F.R. § 103.7; page 15, *supra*. Thus, it is not a happenstance, but essential to its commercial viability and economic attractiveness to lenders, that the Long Company was established in this way.

The BIA Program provides incentives and safeguards to encourage lenders to make loans to Indian-owned businesses. It reduces "excessive risks" to lenders by guaranteeing loans up to 90 percent of the unpaid principal and accrued interest upon default by an Indian borrower. *See* 25 C.F.R. §§ 103.2, 103.6. Moreover, it also pays interest subsidies to lenders. *Id.*, §§ 103.20 – 103.21. And any fees the lenders incur in order to participate in the Program may be passed on to borrowers as part of the loan. *Id.*, § 103.8(a)(1)-(2). Thus, lenders assume virtually no risk in making loans guaranteed under the Program.[21]

In this case, the Bank substantially benefited from the BIA loan guarantees made possible by the majority-Indian ownership of the Long Company. Upon respondents' default, the Bank collected a total of $392,968 in federal loan guarantees from the BIA and other payments tied to the loan agreement as well as

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[21] Notably, the BIA may reject a lender's application to participate in the program "if it believes the lender would be willing to extend the requested financing without a BIA guaranty or insurance coverage." 25 C.F.R. § 103.4(d). The Bank's applications in this case were not rejected on this basis. *See* J.A. 39-40, 47-53, 71-79.

the prior interest-subsidy payments.[22] The Tribe also is aware of other BIA-guaranteed loans that the Bank has made to companies that are majority-owned by CRST members over the last 25 years.

In these circumstances, it rings hollow indeed for the Bank to contend that the Long Company is nothing but a South Dakota corporation when the Bank secured the advantages for itself from the majority-member ownership of the company. It ill behooves the Bank, in its dealings in Indian Country, to try to have it both ways.

It also rings hollow for the Bank to feign surprise and unfairness in being called to account in tribal court for its discrimination against tribal members arising out of its voluntary lending transactions and relationships. For the reasons explained above, the Tribe's cognizable interests under *Montana* should have been evident to a sophisticated and well-counseled lender. In fact, the Bank actually recognized the prospect that tribal jurisdiction would apply. *See* Pet. App. A1-A3. Furthermore, it initially conceded tribal-court jurisdiction over the discrimination claim in this case. *Id.* at A5. Accordingly, this is not a case in which possible difficulties in determining jurisdictional boundaries militate against tribal authority over nonmembers altogether. *See Nevada v. Hicks*, 533 U.S. at 383-85 (Souter, J., concurring).

Likewise, there is no merit to the Bank's expressed concern, relying on Justice Souter's concurrence in *Nevada v. Hicks*, that it could not reasonably anticipate

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[22] *See, e.g.*, J.A. 39, 41, 77; CRST Trial Ct. Tr., Vol. II, at 348-49 (Dec. 11, 2002).

that discrimination based on Native American status would be prohibited by CRST law. In this day and age, anti-discrimination on the basis of race is a settled and core principle of all legal systems in this country. *See, e.g., Bob Jones Univ.*, 461 U.S. at 592 ("there no longer can be any doubt that racial discrimination . . . violates deeply and widely accepted views of elementary justice"). Moreover, the discrimination found by the jury in this case was of the most willful, deliberate, and blatant sort; no refinements debated elsewhere in the law, such as affirmative action or disparate impact, are necessary to condemn the Bank's discrimination here.

To be sure, CRST common law, like all common law, develops and evolves in the course of decisions over time. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 466 (1991) ("[t]he common law, unlike a constitution or statute, provides no definitive text; it is to be derived from the interstices of prior opinions and a well-considered judgment of what is best for the community") (citing Oliver Wendall Holmes, THE COMMON LAW 35-36 (1881)); *Carey v. Piphus*, 435 U.S. 247, 257 (1978). But the fact that a tribal court had not previously declared the obvious – that out-and-out discrimination against Native Americans is unlawful – does not excuse the Bank from otherwise proper tribal jurisdiction. Here, the Tribal Court of Appeals, in rendering its ruling on tribal law, relied on decisions of this Court as well as other authorities under the Tribe's law. Pet. App. A50-A68, 32 Indian L. Rep. at 6002-03; *see also* Pet. App. A14-A15. *See generally* Cohen, § 7.06[1], at 652 (tribal courts apply tribal common law in the absence of tribal code provisions, and they may "convert the state law into tribal law by adopting it as part of the tribal common law").

## II. THE TRIBAL COURT'S EXERCISE OF CIVIL ADJUDICATORY AUTHORITY IN THIS CASE WAS PROPER AND FAIR UNDER *MONTANA*.

### A. Tribal-Court Jurisdiction Is An Appropriate Means To Effectuate The Tribe's Interests.

As explained above, *Montana* recognizes that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565. In particular, under the first *Montana* exception, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* The Eighth Circuit correctly held that the Tribe appropriately exercised civil adjudicatory jurisdiction over the Bank with respect to the claim of discrimination.

The decision below is fully consistent with this Court's precedents. For example, in *Strate*, the Court observed that it was an "unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in tribal courts.'" 520 U.S. at 453 (citation omitted; bracketed material in original). *See also Atkinson Trading Co.*, 532 U.S. at 651-52. In fact, *Montana* itself cited a case involving tribal-court jurisdiction to illustrate the meaning and scope of the first exception. *See* 450 U.S. at 565-66 (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959) (upholding tribal-court jurisdiction over on-reservation contract claim between non-Indian and tribal members)).

What is more, a contrary conclusion would be anomalous and illogical. Where a tribe has sufficient interests to tax a nonmember or regulate the nonmember's conduct, it simply makes no sense to ignore those same interests in deciding whether the tribal court has jurisdiction over the same subject matter. Rather, the tribal court's jurisdiction to adjudicate disputes arising from the underlying consensual relationship, and to provide effective remedies for breaches or violations of legal duties, is derivative of the tribe's authority over the relationship itself. *See* Cohen, § 7.01, at 598 n.12.

This analysis also reflects the fundamental importance of tribal courts in a tribe's governmental system. "Tribal courts play a vital role in tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). Moreover, "the Federal Government has consistently encouraged their development." *Id.* at 14-15; *see also id.* at 16-17 ("[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system"). *See, e.g.*, Indian Tribal Justice Act, 25 U.S.C. §§ 3601 *et seq.* (2000); Indian Tribal Justice and Legal Assistance Act, 25 U.S.C. §§ 3651(6)-(7) (2000) (congressional findings of federal policy acknowledging importance of tribal justice systems to tribal self-determination); Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 113 (1995) ("[T]ribal justice systems are essential pieces of the mosaic of tribal self-governance. The U.S. Department of Justice is firmly committed to increasing self-determination for American Indian tribal governments by strengthening tribal justice systems"). *See also* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 450 (2005).

The Cheyenne River Sioux Tribe's Constitution and Bylaws authorize the establishment of "courts for the adjudication of claims or disputes arising among or affecting the Cheyenne River Sioux Tribe or any Indian present on the Cheyenne River Indian Reservation" and provide that "tribal courts shall have jurisdiction over claims and disputes arising on the reservation." CRST Const., Art. IV § 1(k), amended by Bylaws of the Cheyenne River Sioux Tribe, Art. V, § 1(c). *See also* CRST Const., Art. I. CRST courts are equally available to tribal members and non-members. *See also* pages 29-31, *infra* (Bank has initiated and won cases in the tribal courts).

The Cheyenne River Sioux tribal court system is governed by a comprehensive judicial code. *See* CHEYENNE RIVER SIOUX LAW AND ORDER CODE (1978), as amended. This code contains both substantive and procedural provisions and addresses the complete range of legal disputes that can arise affecting the Tribe and its members. Furthermore, tribal-court opinions are available to the public through the tribal legal department or clerk of court. Selected opinions also are available in the Indian Law Reporter and on the Internet without charge.[23]

The Tribe's judicial system, like those of most modern tribal courts, follows procedures similar to those utilized in federal and state courts around the country. *See* Remarks, Justice Sandra Day O'Connor, *Lessons*

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[23] *See* Tribal Court Clearing House, *available at* http://www.tribal-institute.org. A proposal to provide access to opinions through Westlaw on a fee basis currently is pending.

*from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. REV. 1, 5 (1997) (specifically acknowledging the CRST court system). For example, Anglo-American principles of separation of powers are contained in the tribal Constitution. *See* CRST Const. Art. IV, § 1(k), as amended ("[d]ecisions of tribal courts may be appealed to tribal appellate courts, but shall not be subject to review by the Tribal Council"). Likewise, many of the protections of the Bill of Rights are afforded by the CRST tribal courts.[24] And all trial procedures are governed by rules that either follow or substantially incorporate both state and federal rules on civil and criminal procedure as well as the rules of evidence.[25]

Furthermore, tribal court judges are bound by their oath of office (C.R.C. Title I, § 1-2-6) and follow the American Bar Association Code of Judicial Conduct

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[24] *See, e.g.*, C.R.C. Title II, R.3 (rights of criminal defendants), R.7 (arraignment); C.R.C. Title VII, R.35(b) (habeas corpus). *See generally* Indian Civil Rights Act, 25 U.S.C. §§ 1302-03; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Although not raised in this Court, the Bank complained below that it was denied due process at trial because, *inter alia*, the jury consisted of tribal members. However, the Tribe's court system allows non-Indian litigants to petition to include nonmember jurors – a procedure that the Bank never invoked. *See* C.R.C. Title I, § 1-6-1(2).

[25] *See* Cheyenne River Sioux Tribe Rules of Civil Procedure in C.R.C. Title VII, as amended (1993); *id.*, R.18 (evidence); Rules of Criminal Procedure, C.R.C. Title II, R.15-16 (trial by jury and jury selection); Appeals, C.R.C. Title VII, R.37, as amended by Tribal Court of Appeals Rules (adopted June 1, 1993); pretrial procedure (Title XIV).

(C.R.C. Title I, § 1-2-4(3)). The CRST Code also provides for removal or disqualification of judges. *See* C.R.C. Title I, §§ 1-2-3 to 1-2-5; C.R.C. Title VII, R.33(b). Likewise, the Code sets strict guidelines for the conduct of attorneys and counselors. *See* C.R.C. Title I, § 1-5-6.

Finally, the judges of the tribal courts are well-trained and well-recognized jurists and academics. For example, Chief Justice Frank Pommersheim of the CRST Court of Appeals, who wrote the tribal appellate decision in this case, is a member of the bar of South Dakota and a professor at the University of South Dakota School of Law; a graduate of Columbia University Law School, he serves on several tribal appellate courts, writes extensively in the area of Indian law and is a contributor to the HANDBOOK OF FEDERAL INDIAN LAW by Felix S. Cohen, and has received awards for teaching at the University of South Dakota and its law school. Judge B.J. Jones, who presided as the trial judge in the tribal court in this case, is a member of a number of bars including those of North and South Dakota and is on the faculty of the University of North Dakota School of Law; Judge Jones graduated from the University of Virginia Law School, serves on several tribal appellate and trial courts, and is the Director of the Tribal Judicial Institute at the University of North Dakota Law School.

In light of these characteristics, the State of South Dakota authorizes its courts to give comity to decisions of the CRST tribal courts. *See* S.D. CODIFIED LAWS § 1-1-25 (2007). *See also, e.g., One Feather v. O.S.T. Pub. Safety Comm'n*, 482 N.W.2d 48, 49 (S.D. 1992); *Gesinger*

*v. Gesinger*, 531 N.W.2d 17 (S.D. 1995).[26] Similarly, federal courts afford comity to tribal-court decisions. *See, e.g., Iowa Mut. Ins. Co.*, 480 U.S. at 19; *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006), *cert. denied*, __ U.S. __, 127 S.Ct. 1132 (2007).

These fair and unbiased tribal procedures lead to fair and unbiased results. For instance, the Tribe itself frequently loses cases in the tribal courts. *See, e.g., High Elk v. Iron Hawk*, Case No. 05-002-A, 33 Indian L. Rep. 6031 (CRST Ct. App. 2006) (per curiam).

Of particular significance to this case, the Bank has often prevailed in tribal court or settled cases on favorable terms.[27] In addition, tribal courts have issued

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[26] The Tribe reciprocally recognizes South Dakota decisions for purposes of comity. *See* CRST Tribal Council Resolution No. 323-CR-05 (Aug. 4, 2005).

[27] *See, e.g.*, Findings of Fact and Conclusions of Law, *Bank of Hoven, n/k/a Plains Commerce Bank v. Ducheneaux* (CRST Trial Ct. Sept. 5, 1990) (judgment entered in favor of Bank and setting repayment schedule on overdue loan plus interest and costs, against tribal member); Findings of Fact and Conclusions of Law, *Bank of Hoven, n/k/a Plains Commerce Bank v. Garreau*, Case No. C-325-88 (CRST Trial Ct. Aug. 16, 1989) (judgment in favor of Bank and setting repayment schedule on overdue loan); Stipulation and Agreement, *Bank of Hoven, n/k/a Plains Commerce Bank v. Chasing Hawk*, Case No. C-065-01 (CRST Trial Ct. Aug. 31, 2001) (dismissing complaint and ordering tribal member to make regular payments on overdue loan to Bank, plus costs, and releasing bond against tribal member); Order of Settlement, *Plains Commerce Bank v. Marshall*, Case No. C-092-04 (CRST Trial Ct. Oct. 1, 2004) (approving settlement agreement between parties and releasing impounded vehicles).

numerous judicial orders in favor of the Bank.[28] The Bank also has sought the assistance of tribal courts to obtain relief against tribal members. In fact, in a number of cases, as it did in this case, the Bank has conceded the jurisdiction of the tribal court.[29] And, where the Bank has been successful in litigation in tribal court (whether against tribal members or nonmembers living on the

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[28] *See, e.g.*, Order of Impoundment, *Chasing Hawk*, Case No. C-065-01 (CRST Trial Ct. Aug. 1, 2001); Order of Impoundment, *Plains Commerce Bank v. Laundreaux*, Case No. C-002-03 (CRST Trial Ct. May 20, 2003); Order for Release of Motor Vehicle, *Laundreaux*, Case No. C-002-03 (CRST Trial Ct. Aug. 26, 2003); Order of Impoundment, *Marshall*, Case No. C-092-04 (CRST Trial Ct. July 28, 2004); Order of Disposition, *Garreau*, Case No. C-325-88 (CRST Trial Ct. Aug. 21, 1991) (confirming tribal member's scheduled payments to the Bank as ordered by the court).

[29] *See, e.g.*, Letter from David Von Wald, Attorney on behalf of Bank of Hoven, n/k/a Plains Commerce Bank to Tribal Court (June 10, 1999) (requesting tribal court to serve notice to quit on respondent Ronnie Long); Letter from David Von Wald, Attorney on behalf of Bank of Hoven, n/k/a Plains Commerce Bank to Dale Charging Cloud, Tribal Court Clerk (July 7, 1999) (requesting tribal court's assistance in service of process); *see also, e.g.*, Letter from Tim Gapp, Bank of Hoven to CRST Tribal Court (Aug. 19, 1991) (advising court of its position relating to three show-cause hearings scheduled before the court); Letter from Brent Heinert, Plains Commerce Bank to Cheyenne River Sioux Tribal Court (Dec. 11, 2006) (requesting postponement of hearing); Letter from Charles Simon, Bank of Hoven to Krist High Elk, Clerk of CRST Tribal Court (Jan. 26, 1998) (advising tribal court of defendant-borrower's debt satisfaction and seeking dismissal of complaint).

Reservation), it has accepted the tribal court's jurisdiction without objection.[30]

### B. The Bank's Arguments Do Not Render Tribal-Court Jurisdiction Inappropriate.

The Bank's two objections to tribal court jurisdiction in this case are unavailing and should be rejected.

First, the Bank contends that tribal court adjudication of disputes between members and nonmembers does not constitute "*regulat[ion]* . . . through taxation, licensing, or *other means*" within the meaning of the first *Montana* exception. 450 U.S. at 565 (emphasis added). As previously explained, however, exclusion of civil adjudicatory jurisdiction from a tribe's retained sovereignty is inconsistent with both precedent and logic. Furthermore, the Bank's attempt to scrutinize the language of the Court's opinion as though it were a statute, and its reliance on canons of statutory construction, is fundamentally misconceived. *See, e.g.*,

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[30] *See, e.g.*, *Ducheneaux*, *supra*; *Chasing Hawk*, *supra*; *Marshall*, *supra*; *Garreau*, *supra*; *Laundreaux*, *supra*; *see also, e.g.*, Default Judgment, *Bank of Hoven n/k/a Plains Commerce Bank v. Taylor*, Case No. C-210-88 9 (CRST Trial Ct. Oct. 5, 1988) (default judgment entered against non-Indian former spouse of tribal member living on Reservation); Motion and Order for Execution Hearing, *Taylor*, Case No. C-210-88 (CRST Trial Ct. Nov. 18, 1988); Order, *Taylor*, Case No. C-210-88 (CRST Trial Ct. Dec. 6, 1989); Order, *Taylor*, Case No. C-210-88 (CRST Trial Ct. Jan. 17, 1989); Order, *Taylor*, Case No. C-210-88 (CRST Trial Ct. Feb. 24, 1989); Order, *Taylor*, Case No. 210-88 (CRST Trial Ct. Mar. 21, 1989); Order of Disposition, *Taylor*, Case No. 210-88 (CRST Trial Ct. Apr. 13, 1989) (request by Bank that case be dropped, resulting in order of dismissal).

*C.I.R. v. Bollinger*, 485 U.S. 340, 349 (1988) ("we decline to parse the text of [an opinion] as though that were itself the governing statute"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("the language of an opinion is not always to be parsed as though we were dealing with the language of a statute"). Indeed, this Court recently and explicitly pointed out the error in the Bank's approach in the specific context of an Indian case. *See Nevada v. Hicks*, 533 U.S. at 372. In the end, *Montana* is sufficiently broad to include civil adjudication within tribal retained sovereignty and is not narrowly confined to "legislative enactments . . . nothing else." Pet. Br. 36.

Second, the Bank protests that the Eighth Circuit's decision will turn tribal courts into tribunals of general jurisdiction. That simply is not so. Tribal courts will remain courts of limited jurisdiction, and decisions of this Court limiting tribal adjudicatory jurisdiction will remain good law. *See, e.g., Hicks, supra*; *Strate, supra*. To say that tribal courts have, as a matter of tribal sovereignty, broader jurisdiction than the Bank would like does not mean that they become courts of general and unlimited jurisdiction.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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# In The Supreme Court of the United States

PLAINS COMMERCE BANK,

*Petitioner,*

v.

LONG FAMILY LAND and CATTLE COMPANY, INC., RONNIE LONG, LILA LONG,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF AMICUS CURIAE OF THE STATES OF IDAHO, ALASKA, FLORIDA, OKLAHOMA, NORTH DAKOTA, SOUTH DAKOTA, UTAH, WASHINGTON, AND WISCONSIN IN SUPPORT OF PETITIONER

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The *amici curiae* States, through their respective Attorneys General, respectfully submit an *amicus* brief pursuant to S. Ct. R. 37.4 in support of petitioner.

## INTEREST OF *AMICI CURIAE* STATES

For three decades, this Court has endeavored to define the scope of an Indian tribe's inherent authority over the on-reservation activities of individuals or entities that are not members of the tribe. The decisions have ranged from the criminal context,[1] to the civil regulatory,[2] and to the civil adjudicatory.[3] States were parties in some of these cases and appeared as *amici curiae* in others. Notwithstanding the factual and legal distinctions among the controversies, the

[1] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Duro v. Reina*, 495 U.S. 676 (1990); *United States v. Lara*, 541 U.S. 193 (2004); *see also United States v. Wheeler*, 435 U.S. 313 (1978) (inherent authority of tribe to impose criminal sanctions on its members).

[2] *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Montana v. United States*, 450 U.S. 544 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1983); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

[3] *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353 (2001).

fundamental state interest remained consistent: The need to define with clarity the extent to which nonmembers of a tribe are nevertheless subject to the sovereign powers of that tribe. Clarity is especially critical in the adjudicatory arena for, as Justice Souter observed in *Hicks*, "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals,' . . . which differ from traditional American courts in a number of significant respects." 533 U.S. at 383. Tribal justice systems, in short, often partake of the unique cultural practices and governmental structure of the particular tribe.

The present matter presents yet another opportunity for this Court to define "where tribal jurisdiction begins and ends." The question presented requires it to consider the scope of the first, or consent, exception identified in the "pathmarking" *Montana v. United States* opinion (*Strate v. A-1 Contractors*, 520 U.S. at 445), not only generally but also with reference to whether the requisite "consensual relationship[ ]" can be inferred from dealings between two corporations – neither of which is or could be a tribal member – merely because one of those corporations is majority owned by two tribal members – the individual respondents here. Resolution of the latter issue has independent significance to the *amici* States insofar as it bears directly upon their ability to regulate member-owned corporations and to adjudicate reservation-based disputes when

those corporations are haled into state court without their consent.

The *amici* States believe that the Court's prior decisions leave little doubt about the correct disposition of both issues. First, whatever the precise reach of the *Montana* consent exception in the civil regulatory environment, it requires *actual* and *clear* consent to the exercise of tribal court authority. Second, the touchstone of "Indian" status lies in the unique political relationship which exists between the United States, individual Indians, and the tribes to which they belong. Artificial legal entities like corporations cannot partake of this unique relationship. Indeed, they exist for the very purpose of separating the corporate from the personal. This commonsense conclusion simply means that tribal members, like other individuals, must decide what mode of engaging in commerce best accommodates their particular circumstances. The court of appeals' decision cannot be reconciled with these principles and should be reversed.

## SUMMARY OF THE ARGUMENT

**I.** *Montana* established a bright-line rule that inherent tribal authority presumptively extends only to internal governance matters, *i.e.*, that tribal sovereignty over nonmembers has been divested by the dependent status of Indian tribes. The exceptions to its "main rule" therefore must be construed narrowly.

The second *Montana* exception, for example, authorizes the exercise of tribal civil authority over nonmembers where such exercise is essential "to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Strate*, 520 U.S. at 459. Formulated originally as a federal preemption test, that standard has never been applied by this Court to extend any form of tribal civil authority over the conduct of nonmembers. The Court's *Strate* decision instead established that tribal courts do not have adjudicatory authority over garden-variety tort actions brought against nonmembers under the second exception. There is no principled basis to distinguish respondents' discrimination claim from the personal injury action found outside the exception's reach in *Strate* for second exception purposes.

The existence of nonmember consent for purposes of the first *Montana* exception should be measured by no less stringent standards. An analysis of this Court's immediately relevant precedent – *Strate*, *Atkinson Trading* and the decisions cited in *Montana* itself as the genesis of the consent exception – reflects the need for the predicate "consensual relationship" to be identified with precision and for the nonmember to be shown as having consented to the particular form of tribal civil authority as part of the *quid pro quo* for that relationship. Only actual and clear nonmember consent satisfies this consent standard. The actual and clear requirement has straightforward application in contract situations where the parties can agree to resolve disputes through tribal

court adjudication. However, in the absence of such provisions, the requisite nonmember consent to tribal court jurisdiction over contract-related controversies, including those asserted under tribal tort law, does not exist.

**II.** Application of the proper *Montana* consent-exception standards requires reversal. The relevant consensual relationship was between petitioner and the respondent Long Family Land and Cattle Company, Inc. ("Long Company") – a South Dakota corporation and therefore a nonmember. The court of appeals erred in relying on its perception of the "broader" interaction between petitioner and the individual respondents to transform the Long Company into a tribal member for consent-exception purposes. The lower court's approach ignores this Court's now-settled authority holding that "Indian" status carries with it an ancestral, or racial, component and limiting the reach of a tribe's "internal relations" to its own members. That approach also ignores the fact that the very goal in forming the Company was to create a legal entity separate from the individual respondents. Aside from greatly complicating application of the consent exception, the Eighth Circuit's elastic understanding of "member" status would have a potentially disruptive impact on the States' ability to enforce their laws on reservations against corporate entities wholly or partially owned by tribal members.

Because the Long Company is a nonmember, no plausible claim of consent to the exercise of tribal

court authority over a common-law cause of action for discrimination exists given this Court's analysis in *Strate*. The individual respondents, like the *Strate* tribal court plaintiffs, were "strangers" to the contractual relationship that was the sole predicate for application of the first exception. Even if the Company had been properly deemed a "member" for *Montana* purposes, nothing in the 1996 lease with option to purchase embodied consent to tribal court adjudication for disputes arising out of the negotiation or application of that contract, including tort claims of any kind. The court of appeals' contrary conclusion means in practical effect that tribes have civil regulatory authority over all but wholly nonmember commercial transactions on the basis of constructive, not actual, consent. Such an expansive application of the first exception undermines *Montana*'s "main rule" and closely approximates a comparable constructive consent rationale rejected in *Atkinson Trading*.

## ARGUMENT

The proposition that tribal court adjudication of common law-based tort claims fall within the scope of the first *Montana* exception is anomalous on its face. The exception demands the presence of a "consensual relationship" – a requirement foreign to most torts and indisputably not an element of the "discrimination" claim adjudicated by the tribal courts below. *Montana*, 450 U.S. at 455 ("[a] tribe may regulate,

through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"). The "duty" sought to be enforced in a tort action thus is typically an invasion of an interest legally protected *de hors* a contract. As the *Restatement* explains, "[t]he duty in contract is normally to do or refrain from doing a particular or definite thing irrespective of the end which is to be served[,]" while "[t]he duty in tort is only occasionally to do or refrain from doing a particular thing" and, instead, "is merely a means whereby the interest protected by the duty can be made secure." *Restatement (Second) of Torts* § 4, cmt. c (1965) ("*Restatement*"). Another key distinguishing feature is that contractual duties are known and operate prospectively but "the actor's duty in tort is often to conduct himself in a manner the propriety of which is to be determined ex post facto." *Id.*

The *amici* States nevertheless understand the decision below to conclude that the exception applies because it *grows out* of a consensual relationship – *i.e.*, the 1996 lease with option to purchase between petitioner and the Long Company. Even if one accepts that premise and the Company's status as a nonmember for *Montana* purposes, the requisite consent to the application of tribal court authority to adjudicate the discrimination claim logically must similarly grow out of the same relationship and be defined by the parties' consensual undertakings. Where, as here,

the contract is silent as to *any* form of enforcement, implying consent to application of tribal tort law and tribal court power to apply that law vitiates any ordinary notion of "consent." *See Restatement* § 10A ("[t]he word "consent" is used throughout the Restatement . . . to denote *willingness in fact* that an act or an invasion of an interest shall take place") (emphasis supplied). That conclusion, otherwise consistent with accepted tort law principles, also follows inexorably from this Court's analysis of *Montana*'s exceptions generally and the first exception specifically. The States' argument first outlines the relevant standards and then applies them to the circumstances here.

## I. *MONTANA*'S FIRST EXCEPTION IS PREDICATED ON A NONMEMBER'S VOLUNTARY SUBMISSION TO TRIBAL AUTHORITY AND, WHERE ADJUDICATORY JURISDICTION IS INVOLVED, REQUIRES ACTUAL AND CLEAR CONSENT TO THE EXERCISE OF SUCH JURISDICTION

### A.

Analysis of the *Montana* exceptions must begin by recognizing the strength of the general rule to which they apply. This Court left no doubt in *Montana* that the "implicit divestiture of [tribal] sovereignty" (*Wheeler*, 435 U.S. at 326) by virtue of Indian tribes' dependent status precludes any "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations"

absent "express congressional delegation." *Montana*, 450 U.S. at 564.[4] While it eschewed extending the complete divestiture of tribal criminal authority over non-Indians found in *Oliphant* to civil proceedings, the *Montana* Court stressed that the principles relied upon in the earlier case "support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. *Montana* therefore establishes a bright-line and forceful presumption – or "main rule" (*Strate*, 520 U.S. at 453) – against the exercise of tribal civil authority of any type to individuals who are not members of the involved tribe. The Court thus has warned against construing the *Montana* exceptions in a manner that "would severely shrink" (*Strate*, 520 U.S. at 458) or "swallow the rule" (*Atkinson Trading*, 532 U.S. at 655). The strength of *Montana*'s main rule is reflected further in this Court's subsequent decision-making. While specific to their facts, these cases have construed the exceptions narrowly and declined to find either applicable.

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[4] No claim of congressional delegation, express or otherwise, exists here. *See* Pet. A-10 n.5. The only positive federal law relevant to this controversy identified below was loan guaranty program established under Department of the Interior regulations. Pet. at A-11; *see* 25 C.F.R. pt. 103 (2007). Those regulations do not extend any authority to tribes over the underlying contractual undertakings. *See id.* § 103.3 (Secretary of the Interior has "ultimate[ ]" authority to administer program but, "[a]bsent a direct exercise of authority, . . . delegates Program authority to [Bureau of Indian Affairs] officials through the U.S. Department of Interior Departmental Manual").

So, for example, the second exception – the "exercise [of] civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" (*Montana*, 450 U.S. at 566) – has been construed as a mirror-image of the formulation of the standard for determining when state adjudicatory authority is preempted. This Court accordingly held in *Strate* that the exception's proper application must focus on what "is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" 520 U.S. at 459 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). "Opening the Tribal Courts for [an injured nonmember's tort claim]," the Court concluded unanimously, is not necessary to protect tribal self-government." Tribal self-government interests, in other words, do not compel submission by nonmember defendants to tribal court authority where adequate judicial remedies exist before state or federal courts.

This Court reaffirmed the self-government protection standard four years later in *Hicks* and *Atkinson Trading*. The *Hicks* Court held that the second exception could not provide a basis for the exercise of jurisdiction over on-reservation law enforcement activities of state game officials when enforcing a search warrant related to a possible off-reservation crime, despite the fact that enforcement occurred on the member suspect's reservation property. 533 U.S. at 364. It reasoned that earlier decisions had "suggest[ed]

state authority to issue search warrants in cases such as the one before us" and that "[t]he State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government." *Id.* at 363-64. The Court left open the possibility that state officers might be subject to tribal regulation "depending on the outcome of *Montana* analysis" for actions unrelated to legitimate law enforcement functions but observed that, in such situations, "the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- and state-law rights." *Id.* at 373. The existence of those nontribal remedies, once again, mitigated the need for tribal jurisdiction to redress alleged abuses.

Unlike *Strate* and *Hicks*, *Atkinson Trading* dealt with a purely regulatory question – tribal authority to impose a hotel occupancy tax on customers of a corporate trading post doing business on its fee-owed land – but similarly rejected application of the second exception because "[t]he exception is only triggered by *nonmember conduct* that threatens the Indian tribe . . . [and] does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government." 532 U.S. at 657 n.12. Consequently, "unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of

the Indian tribe, there can be no assertion of civil authority beyond tribal lands." The second exception, the *Atkinson Trading* Court later reiterated, subjects nonmembers to a tribe's "civil authority" at most in those situations where "the impact of the nonmember's conduct 'must be *demonstrably serious* and must *imperil* the political integrity, the economic security, or the health and welfare of the tribe.'" *Id.* at 659 (quoting *Brendale*, 492 U.S. at 431 (opinion of White, J.)) (emphasis supplied).[5]

More generally, this Court has found the requisite infringement on tribal self-government interests

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[5] It warrants mention that Justice White's opinion in *Brendale* rejected *any* application of the second exception to attempted tribal regulation of nonmembers' use of their fee lands. 492 U.S. at 430 ("[t]he governing principle is that the tribe has not authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land"). His opinion used the "demonstrably serious" and "imperil" standard to describe those instances in which a tribe possesses a "protectible interest" capable of vindication in state and federal court. *Id.* at 431. The opinion nonetheless suggested that the second exception might provide a basis for the exercise of tribal authority in other regulatory areas. *Id.* at 429 (the use of "may" in the second exception's formulation "indicates ... that a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,' but instead depends on the circumstances"). *Atkinson Trading*, in contrast, employed the "demonstrably serious" and "imperil" standard as a showing essential to a tribe's taxing nonmembers with respect to transactions on nontribal land, at least in areas not comparable to the "closed" lands described in Justice Stevens' separate *Brendale* opinion. *Atkinson Trading*, 532 U.S. at 658-59.

only in three instances: *Williams*; *Fisher v. District Court*, 424 U.S. 382, 386 (1976) (*per curiam*); and *Kennerly v. District Court*, 400 U.S. 423 (1971) (*per curiam*). Each decision involved the same basic jurisdictional issue of whether *tribal members* could be subjected without their consent to state court jurisdiction over reservation-based disputes. They did not speak to whether nonmembers could be sued in tribal court without their consent. Indeed, at the time *Williams* was decided, the Navajo Nation employed Courts of Indian Offenses that could not exercise jurisdiction over nonmembers without stipulation of all parties. 25 C.F.R. §§ 11.1, 11.22C (1958); *see generally* Stephen Conn, *Mid-Passage – The Navajo Tribe and Its First Legal Revolution*, 6 Am. Indian L. Rev. 329, 354-64 (1978) (discussing the interrelationship between *Williams* and the more general issue of debt collection actions against tribal members and the Navajo Nation's determination to replace the Court of Indian Offenses with an independent judicial system). *Strate* further suggests that tribal courts never have authority over nonmembers with respect to garden-variety tort claims of the sort here under the second exception, since no sound basis exists to distinguish respondents' claim of discrimination from injuries caused by "those who drive carelessly on a public highway running through a reservation . . . and surely jeopardize the safety of tribal members." *Strate*, 520 U.S. at 457-58.

## B.

The question presented here does not ask this Court to determine whether the Cheyenne River Sioux Tribal Court possessed adjudicatory authority over petitioner under the second *Montana* exception. The federal courts below left that issue unaddressed. Pet. A-14 n.7, A-34. The exception nevertheless is central to assessing the scope of the first exception to remember that the second embodies the *only* circumstances under which a tribe may exercise its authority over a nonmember without the latter's consent. The necessary corollary is that consent to the otherwise extraordinary exercise of such authority – and particularly when that authority takes the form of adjudicatory proceedings before tribal tribunals applying often uncertain law and subject to no review as to non-jurisdictional issues (*Hicks*, 533 U.S. at 384-85 (Souter, J., concurring)) – should be measured by equally, if not even more, stringent standards.[6] This

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[6] This case illustrates the uncertainty over substantive law that may attend tribal court litigation. The tribal trial court construed respondents' discrimination claim as arising under federal law – specifically 42 U.S.C. § 2000d – because "[t]he Tribe does not appear to have specific [tribal] code provisions prohibiting private discrimination and the court is therefore instructed to look to relevant federal law." Pet. A-81. That approach arguably ran afoul of *Hicks*' determination that tribal courts lack inherent authority to entertain claims under federal law. 533 U.S. at 366-67. The Cheyenne River Sioux Tribal Court of Appeals altered the lower court's reasoning, but not the ultimate result, by holding that a tribal common law-based claim for discrimination should be created and defined in "Lakota customs and norms." Pet. A-54 ("[s]uch a potential claim

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Court's decisions in *Strate* and *Atkinson Trading*, as well as the several cases cited by *Montana* in support of the consent exception, provide dispositive guidance on those standards.

The *Montana* Court cited four cases as relevant to the consent exception: *Williams*; *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905); and *Colville*. *Williams* has been discussed above and simply stands for the proposition that a nonmember may invoke voluntarily tribal court jurisdiction despite the fact that, as there, nonmembers were not subject to unconsented suit. The merchant thus had the option of pursuing tribal court remedies to enforce the debts allegedly incurred by his Navajo customers.

*Morris* rejected an attempt by non-Indians to enjoin federal officials from enforcing a Chickasaw Nation law and accompanying federal regulations that required the payment of a fee for cattle and horse grazing on tribal land. This Court cited with approval an Attorney General Opinion issued in 1900 construing relevant treaties and federal legislation and reasoning, in part, that purchasers of lots within the Nation's Oklahoma territory did so "'with notice

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arises directly from the existence of Lakota customs and norms such as the 'traditional Lakota sense of justice, fair play and decency to others[ ]' . . . and 'the Lakota custom of fairness and respect for individual dignity'") (citations omitted). The *Hicks*-related difficulty thus was eliminated but was replaced by a culturally-grounded liability theory of indefinite scope.

of existing Indian treaties, and with full knowledge that they can only occupy them by permission from the Indians[,]" and that "'[s]uch lands are sold under the assumption that the purchasers will comply with the local laws.'" 194 U.S. at 392 (quoting 23 Att'y Gen. Op. 214 (1900)). No comparable assumption exists here; rather, the opposite is true. *Montana*, 450 U.S. at 559 ("[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government"); *Bourland*, 508 U.S. at 692 (holding generally and with specific respect to the Cheyenne River Sioux Reservation that "regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control"). It additionally bears noting that *Morris* did not involve the exercise of tribal adjudicatory authority. The non-Indians instead sought to enjoin the Department of the Interior officials from enforcing federal regulations.

*Buster* and *Colville* similarly arose from tax disputes and fit into the paradigm of nonmembers consciously subjecting themselves to the tax as the *quid pro quo* for carrying on commercial transactions with tribes or their agents. This Court clarified in *Atkinson Trading* that *Montana*'s reference to *Buster* was intended only to provide "guidance . . . as to the

*type of consensual relationship* contemplated by the first exception" and that "we have never endorsed *Buster*'s statement that an Indian tribe's 'jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it.'" 532 U.S. at 653 n.4 (emphasis supplied). The "type" of arrangement there was a permit tax approved by the President and then imposed by the Creek Nation on nonmembers as a condition of doing business within its territory. *Buster*, 135 F. at 949.[7] *Colville* upheld tribal authority to impose cigarette taxes on nonmember reservation customers as part of the purchase price of the goods. 447 U.S. at 144, 153.

**2.** *Strate* and *Atkinson Trading* provide the most immediate assistance as to the scope of the *Montana* consent exception. In *Strate*, this Court dismissed with brief analysis the asserted applicability of the consent exception to a tort claim predicated on a reservation highway accident with a nonmember, where the defendant was party to building construction subcontract on a tribal project. The record was unclear as to whether the defendant was in the process of carrying out its contractual responsibilities

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[7] *Atkinson Trading* disclaimed any intent to rely on *Buster* to the extent that it could be read to mean that a tribe may impose a tax as a condition for the use of nontribal land within a reservation. 532 U.S. at 653 n.4. The Court held instead that "[a]n Indian tribe's sovereign power to tax – whatever its derivation – reaches no further than tribal land." *Id.* at 653. The result in *Buster* therefore appears suspect.

at the time of the accident (520 U.S. at 443), but resolution of that factual uncertainty was unnecessary. The reason was straightforward: The alleged tort victim "'was not a party to the subcontract, and the [T]ribes were strangers to the accident.'" *Id.* at 457. The accident thus "present[ed] no 'consensual relationship' of the qualifying kind" when "measured" against the decisions cited by *Montana* as emblematic of the first exception. *Id.*

This Court's consent-exception discussion in *Atkinson Trading* was more extensive. It initially rejected the tribe's contention that the requisite consensual relationship was inferable from the acceptance by the trading post and its guests of various tribal services. 532 U.S. at 654. "[T]he generalized availability of tribal services," the Court stated, is "patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land." *Id.* at 655. The tribal officials' argument, in other words, proved far too much because "[a]ll non-Indian fee lands within a reservation benefit, to some extent, from the 'advantages of a civilized society' offered by the Indian tribe" and consent to tribal regulation therefore would be implied from mere presence on the reservation – a conclusion "which ignores the dependent status of Indian tribes and subverts the territorial restriction upon tribal power." *Id.* This Court next rejected the tribe's and the *amicus curiae* United States' reliance on the petitioner trading post's licensure as an Indian trader under federal law. It reasoned that "*Montana*'s consensual relationship

exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself" but that "[t]he hotel occupancy tax at issue here is grounded in petitioner's relationship with its nonmember hotel guests, who can reach the . . . Trading Post on . . . non-Indian public rights-of-way." *Id.* at 656-57. In a nutshell, "[a] nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'" *Id.* at 656.

**3.** This Court's disposition of the consent-exception issue in *Strate* and *Atkinson Trading* highlights the need to identify with care the foundational "consensual relationship" with the tribe or its members and then to assess the "nexus" – or *quid pro quo* – between that relationship and the tribal regulation or claim in dispute. The outcome in those cases differed from the several taxation decisions cited in *Montana* as support for the first exception because the *quid pro quo* element was missing; *i.e.*, there was no consent by the nonmember to the regulation as the price for being permitted to engage in the regulated activity. Implicit in the *quid pro quo* requirement is the need to examine closely the nature of the predicate consensual arrangement and to determine whether it manifests the necessary nonmember consent to the exercise of the *particular* form of tribal authority at issue. The *amici* States further draw from *Montana* and its progeny the rule that, at least in the civil adjudicatory environment, nonmember

consent must be *actual* and *clear*. Several considerations support the latter requirement.

First, this Court has recognized that "tribal courts embody only the powers of *internal* self-governance." *Duro*, 495 U.S. at 692. They thus are fundamentally instruments for resolving disputes between tribal members with reference to tribal law. Tribes have no obligation to open their judicial systems to nonmember-initiated claims and, as discussed above, have no jurisdiction over nonmembers absent applicability of a *Montana* exception. *See Hicks*, 533 U.S. at 367 (tribal courts are not "courts of general jurisdiction" comparable to state courts, which "'lay[ ] hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe[,]'" because "a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction"). Also significant is the fact that the internal-governance role played by tribal courts derives from "the consent of the governed" – *i.e.*, individuals who have entered into a political relationship with the tribe. *Duro*, 495 U.S. at 693 ("[t]he retained sovereignty of the tribe is but a recognition of certain additional authority that tribes maintain over Indians who consent to be tribal members").[8] Any consent standard thus should be

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[8] Amendments to the Indian Civil Rights Act responded to *Duro* and authorized tribal criminal jurisdiction over nonmember Indians created an exception to this general rule. Pub. L. No.

(Continued on following page)

stringent enough to ensure that a nonmember has knowingly acceded to tribal adjudicatory jurisdiction.

Second, requiring the nonmember consent to be actual and clear ensures that parties to the "*private* consensual relationship[s]" contemplated under the first exception (*Hicks*, 533 U.S. at 359 n.3) do not through inadvertence commit themselves to the jurisdiction of a sovereign that, in the absence of consent, lacks adjudicatory power. *Williams* is instructive in this regard, since it effectively eliminated the ability of one party to the commercial transaction to hale the other into a court system whose jurisdiction the latter had not consented to; *i.e.*, the Arizona courts could have entertained an action against the Indian trader by his customers, while the Navajo courts could have entertained an action against the customers by the trader.

Last, the actual and clear standard is used to determine whether a tribe has consented to adjudication of its rights in, *inter alia*, a state court. *E.g.*, *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). Symmetry in standards not only comports with basic notions of equity

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102-137, 105 Stat. 646 (1991) (making permanent Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892 (1990)); *see Lara*, 541 U.S. at 200 (Congress possessed power to "relax the restrictions, recognized in *Duro*, that the political branches had imposed on the tribes' exercise of inherent prosecutorial power"). This limited extension of inherent tribal authority merely reinforces the more general rule.

but also means that courts will have a ready source of federal common law to resolve, when necessary, disputes over whether the requisite clarity of consent exists. The proposed standard therefore encourages the parties to consider and address the dispute resolution issue with some precision.

Application of the actual and clear standard in the ordinary contract situation is straightforward. The parties may contain choice-of-law and forum provisions that provide for application of non-tribal law and dispute resolution in a non-tribal forum. *See Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir. 1993) ("In the Letter of Intent, Sioux Manufacturing Corporation explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois. To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination"); *cf. C & L Enters.*, 532 U.S. at 422 ("clause [providing for enforcement of arbitration awards in any court having jurisdiction] no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime" and waived its immunity to suit). No reasonable question could be raised, in the face of such a provision, that the nonmember party has "consented" to tribal adjudicatory authority. Alternatively, the parties may agree to exclusive use of a tribal forum, and, again, no reasonable question could be raised that the nonmember has *not* "consented" to tribal adjudicatory authority. Failure to address the forum issue would mean that, absent consent on the

defendant's part, the contract could be enforced by the tribal party only in state court and by the nonmember at most in tribal court. The contractual arrangements relied upon by the courts below and respondents fall into this category.

## II. NEITHER THE AGREEMENTS BETWEEN PETITIONER AND RESPONDENT LONG COMPANY NOR THE GUARANTY AGREEMENT WITH THE INDIVIDUAL RESPONDENTS PROVIDE A BASIS FOR THE IMPOSITION OF TRIBAL COMMON LAW TORT LIABILITY UPON PETITIONER UNDER THE FIRST *MONTANA* EXCEPTION

The court of appeals relied upon what it characterized as the "broader context of its interaction with the Long Company and the Longs themselves" to find the consensual relationship upon which to ground application of the first *Montana* exception. Pet. A-11. That "context" consisted of agreements between petitioner and respondent Long Company and personal guaranties for the Long Company's indebtedness entered into by respondents and Maxine Long, respondent Ronnie Long's mother who died in 1992. *Id.* The Long Company is a South Dakota-chartered corporation. Respondents, who are members of the Cheyenne River Sioux Tribe ("CRST"), own at least a majority of its outstanding stock. The predicate contracts with the Company are a loan agreement dated December 5, 1996 and, most important, a lease with an option to purchase executed on the same

date. The individual respondents signed the former in the capacities of the Company's president and secretary-treasurer; respondent Ronnie Long signed the latter in his authorized role as president. J.A. 101, 106. The lease agreement related to land then owned by petitioner and later sold to nonmembers. The individual respondents' personal guaranty was directed to the Company's indebtedness to petitioner under the 1996 loan agreement and "any extensions, renewals or replacements thereof." J.A. 130. None of the contracts provided a mechanism for dispute resolution or choice of law. The Company's indebtedness under the 1996 agreement was additionally subject to a Bureau of Indian Affairs ("BIA") loan guaranty under 25 C.F.R. part 103. Petitioner made no attempt to enforce the individual respondents' personal guaranty in any judicial or other forum. *See* J.A. 184-85 (petitioner's tribal court counterclaim for eviction and holdover damages). The district court's summary judgment record – which consists largely of tribal court exhibits, hearing transcripts and pleadings or orders – contained documents related to contracts and personal guaranties predating the 1996 loan agreement, but there was no contention below that they imposed any liability on the Company or the individual respondents subsequent to execution of the 1996 loan agreement.

This factual summary, although brief, is nevertheless more than adequate for purposes of answering the question whether the *Montana* consent exception

applies to respondents' tort claim premised on Indian-status discrimination. It shows that the 1996 loan and lease agreements were between two nonmembers: petitioner and the Long Company; that petitioner did not seek to enforce the individual respondents' personal guaranty; and that any alleged discrimination related to the lease agreement and the subsequent sale of the leased property to nonmembers. *See* Pet. A-55 (tribal appellate court opinion characterizing "[t]he core of the Longs' discrimination claim" as "the Bank's letter to the Longs dated April 26, 1996 . . . in which the Bank withdrew its offer to sell the land back to Longs on a 20 year contract for deed because it involved an 'Indian owned entity' and related (but unidentified) 'jurisdictional problems[]'"); J.A. 172-73 (tribal court amended complaint's discrimination allegations). Respondents thus ask this Court to deem the Long Company a "tribal member" for consent-exception purposes and to infer from the lease agreement petitioner's consent to being sued in tribal court for discrimination in connection with the refusal to enter into a particular form of contract with the Company. The consent exception, however, plainly does not apply under these circumstances.

## A.

That the Long Company's legal status is distinct from the individual respondents is settled under applicable state law. As the South Dakota Supreme Court has stated on repeated occasions, "[a] firmly

entrenched doctrine of American law is the concept that a corporation is considered a legal entity separate and distinct from its officers, directors and shareholders until there is a *sufficient reason* to the contrary." *Kan. Gas & Elec. Co. v. Ross*, 521 N.W.2d 107, 111 (S.D. 1994); *accord Osloond v. Osloond*, 609 N.W.2d 118, 122 (S.D. 2000); *Brevet Int'l, Inc. v. Great Plains Luggage Co.*, 604 N.W.2d 268, 273-74 (S.D. 2000). It explained further in *Kansas Gas & Electric* that the separate legal status of corporations "is considered the central purpose for choosing the corporate form because it permits corporate shareholders to limit their personal liability to the extent of their investments." 521 N.W.2d at 111. Like other American jurisdictions, South Dakota allows that the "corporate veil" may be pierced "to disregard the distinction between a corporation and its shareholders to prevent fraud or injustice" – *i.e.*, when the corporate form is used by shareholders, officers, or directors "to *defeat* public convenience, justify wrong, protect fraud, or defend crime." *Id.* (emphasis supplied). The veil is pierced, in other words, to impose individual liability for obligations nominally those of the corporation because of illegal or inequitable conduct by the shareholder, officer, or director. Petitioner thus entered into a "consensual relationship" under the 1996 agreements not with the individual respondents but with the Long Company itself. Tellingly, the Department of the Interior's loan guaranty regulations themselves distinguish between "[a]n Indian individual," who must be a member of a federally acknowledged Indian tribe (25 C.F.R.

§ 103.44), and "[a]n Indian-owned business entity organized under Federal, State, or tribal law, with an organizational structure reasonably acceptable to BIA" (*id.* § 103.25(a)), with the latter eligible for loan guaranties in excess of those available to individual Indians (*id.* § 103.5).

Neither respondents nor the various courts below suggested that the Long Company is either an "Indian" or a member of the CRST. Any such suggestion, of course, would have flouted settled authority from this Court that "Indian" status has a racial ancestry component. *See, e.g.*, *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (non-Indian adopted into tribe did not qualify for Indian-against-Indian exemption from prosecution under federal criminal statute, since "the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race" and "does not speak of members of a tribe, but of the race generally, – of the family of Indians"). The court of appeals nevertheless imbued the Company with membership status for *Montana* purposes "[b]ecause the bank not only transacted with a corporation of conspicuous Indian character, but also formed concrete commercial relationships with the Indian owners of that corporation." Pet. A-12. "At its heart," the court added, "the *Montana* inquiry is about tribal interests and tribal self government." *Id.*

The Eighth Circuit's analysis misses the mark widely. This Court determined over a quarter-century ago that the critical distinction between the categorical

rule precluding state taxation on Indian reservations absent congressional authorization is membership status in the resident tribe. *Colville,* 447 U.S. at 160-61; *see also Rice v. Rehner*, 463 U.S. 713, 720 (1983) (applying distinction to non-tax state civil regulation). It followed *Colville*'s lead in *Duro* where it distinguished between tribal members and Indian nonmembers where criminal prosecution was at stake. It reasoned that nonmember Indians did not differ from non-Indians "[i]n the area of criminal enforcement" because "tribal power does not extend beyond internal relations among members." The Long Company is even more removed from the ambit of "internal relations" given its formation under state law with the objective of establishing a legal entity separate and apart from its stockholders to take advantage of benefits that accrue under the federal loan guaranty program unavailable to individual tribal members. The Company thus came into existence not to further *internal* tribal relations but, *inter alia*, to leverage the ability of its stockholders, who included the individual respondents, to engage in relations with commercial lending institutions like petitioner. It makes no sense to conclude under these circumstances that petitioner should have realized that, by loaning money to and entering into a leasing arrangement with the Long Company, it was actually contracting with a tribal member. The court of appeals' reliance on the history of personal guaranties by the individual respondents for the Long Company's loans (Pet. A-11) actually supports the conclusion that petitioner realized that, as a matter of state

commercial law, it was contracting with a corporate entity. The guaranties would have served no purpose otherwise.

Indulging the position taken below also carries with it pernicious consequences, from the *amici* States' perspective, in other Indian law-related contexts. Examples abound. It is often critical to determine whether a tribe or tribal member bears the legal incidence of a state tax to the extent it applies to on-reservation transactions or property. *E.g.*, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101-10 (2005); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) ("[i]n the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule" that precludes such taxation with respect to on-reservation transactions or property where the legal incidence falls on the resident tribe or its members except when Congress has authorized the tax in "'unmistakably clear'" terms). The court of appeals' reasoning could be advanced to establish at the least *pro tanto* "member" status for corporations that are partly owned by tribal members – *i.e.*, an immunity from taxation proportionate to the amount of tribal member ownership. Such a requirement would be cumbersome, if not impossible, to administer. On-reservation application of state laws, which otherwise can be enforced against a nonmember, could be compromised where the corporation's equity is owned in whole or part by a tribal member, since substantially more stringent preemption standards apply when a

State attempts to enforce its civil regulatory laws against members than against nonmembers. *Compare New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) ("exceptional circumstances" required before state civil regulatory authority exists over tribal members with respect to on-reservation activity), *with County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992) ("[t]his Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands"); and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980) (interest-balancing test applied to on-reservation civil regulation of nonmembers doing business with tribe).[9]

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[9] This case does not involve the status of corporate entities as "Indian tribes" for sovereign immunity or other purposes. *E.g.*, *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 705 n.1 (2003) (accepting without substantive analysis the assertion that a tribal corporation was an "arm of the tribe" and therefore entitled to assert tribal immunity from suit but not "person" status under 42 U.S.C. § 1983); *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275 (Wash. 2006) (adopting "bright-line rule" that "tribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe, and created under its own tribal laws") (plurality op.), *cert. denied*, 127 S. Ct. 2161 (2007); *cf. Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) ("[w]hen the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe"), *cert. denied*, 127 S. Ct. 1307 (2007).

This case illustrates the *amici* States' concerns. The court of appeals relied on petitioner's expression of concern over "possible jurisdictional problems if [it] ever had to foreclose on this land when it is contracted or leased to an Indian owned entity on the reservation" (J.A. 91) as supporting the proposition that "[t]he bank could not have been unaware that it might be subject to tribal jurisdiction." Pet. A-11. The letter, which conveyed the advice of the bank's counsel, reflected understandable caution over the often hazy contours of civil jurisdiction within Indian country and, in light of the South Dakota Supreme Court's subsequent treatment of a tribal member-owned corporation as a member for preemption analysis purposes in *Pourier v. South Dakota Department of Revenue*, 658 N.W.2d 395 (S.D. 2003), *vacated in part on other grounds*, 674 N.W.2d 314 (2004), *cert. denied*, 541 U.S. 1064 (2005), arguably proved prescient. *Compare Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1134-35 (9th Cir.) (college incorporated under state and tribal law deemed "member" for *Montana* purposes), *cert. denied*, 126 S. Ct. 2893 (2006); *Flat Ctr. Farms, Inc. v. State Dep't of Revenue*, 49 P.3d 578 (Mont.) (tribal member-owned company incorporated under state and tribal law enjoyed same immunity from taxation as tribal member where corporation conducted all activity on reservation), *cert. denied*, 537 U.S. 1046 (2002), *with Baraga Prods., Inc. v. Comm'r*, 971 F. Supp. 294 (W.D. Mich. 1997) (corporation created under state law, whose only shareholder was tribal member, did not possess Indian status since "[w]hen the taxpayer chooses the

advantages of incorporation, it must also accept the disadvantages with regard to taxation"), *aff'd*, 156 F.3d 1228 (6th Cir. 1998) (unpublished op.). The present matter consequently presents an opportunity to remove apparent doctrinal confusion on this point. *See Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 34 (1999) (noting that the respondent taxpayer was a corporation chartered under the Blackfeet Tribe's law and owned by a tribal member, but also noting concession that the corporation was equivalent to a non-Indian because the taxed proceeds were generated from work on reservations other than the Blackfeet Reservation).

**B.**

The "member" status of the Long Company constituted the linchpin of the analysis below with respect to applicability of the *Montana* consent exception since it, not the individual respondents, was denied the allegedly favorable purchase terms. Lacking this status, the consensual relationship was reduced, for present purposes, to the 1997 guaranty agreement that not only was unenforced but also had nothing to do with the alleged discrimination. The guaranty is as well silent as to enforcement. The nexus and consent requirements discussed in Part I.B.3 above are plainly absent. Indeed, this case bears striking resemblance to *Strate* where this Court found no consent to a tort suit brought by a nonmember, who had been injured in a reservation motor vehicle accident, and her five children, who were

tribal members and complained of loss of consortium with their mother. *Strate*, 520 U.S. at 443-44. The individual respondents here, no less than the *Strate* tribal court plaintiffs with respect to the subcontract between A-1 Contractors and the resident tribe, were not parties to the lease between petitioner and the Long Company. *Id.* at 457. They were, for legal purposes, "strangers" to the lease agreement and to the entity against whom the alleged discrimination was visited.

However, even if "member" status of the Long Company is assumed, the result does not change. Petitioner entered into a commercial relationship with the Company whose scope was defined by the involved contract itself. The agreement related to the right to occupy land owned by petitioner and spelled out in substantial detail the parties' rights and responsibilities. J.A. 96-103. Its duration was two years, and the Company was accorded the option to purchase the property for $468,000 during the lease term. J.A. 98. Nothing suggested, much less expressed, petitioner's consent to any form of tribal regulation, including the exercise of adjudicatory authority to resolve disputes related to the negotiation or subsequent application of the agreement.

On the basis of this straightforward and self-contained bilateral relationship, the court of appeals effectively implied consent as a matter of law to the CRST's authority through common-law tort law "to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with

tribal members." Pet. A-13. It later reiterated that "[b]y subjecting the bank to liability for violating tribal antidiscrimination law in the course of business dealings with the Longs, the Tribe was setting limits on how nonmembers may engage in commercial transactions with members inside the reservation." Pet. A-14. The rule to be drawn from these statements is that any time a nonmember enters into "business dealings" or "commercial transactions" anywhere within a reservation the nonmember has consented to any form of tribal regulation – whether legislative or common law in nature – for purposes of *Montana*'s first exception so long as the regulation has some connection to the dealings or transactions. This approach effectively arrogates to a tribe sovereign authority over all but purely nonmember consensual relationships within a reservation under a constructive, as opposed to an actual, consent rationale.

The first exception cannot shoulder the burden placed on it by the opinion below. The Eighth Circuit's approach extends to tribes a form of reservation-wide sovereign control over nonmembers that eviscerates *Montana*'s main rule. This Court found a comparably expansive reading of the consent exception in *Atkinson Trading* as "ignor[ing] the dependent status of Indian tribes and subvert[ing] the territorial restriction upon tribal power." 532 U.S. at 655. There, the tribe claimed that nonmember hotel guests consented as a matter of law to tribal taxation by virtue of utilizing or having access to tribal services without regard to the fact that the taxed transaction occurred

on nontribally-owned fee land; here, respondents claim that nonmembers have consented as a matter of law to general tribal civil authority to regulate their interactions with tribal members notwithstanding the fact that those interactions related to the disposition of land owned by respondent.

The consent contemplated by *Montana* and later decisions, in sum, is not a legal fiction. It instead must be manifested by the nonmember's knowing acceptance of a particular tribal regulation or form of authority – *e.g.*, suit in tribal court – that has been identified as a *quid pro quo* for entering into the commercial relationship. No such actual and clear consent exists instantly on petitioner's part with respect to enforcement of the contracts with the Long Company, let alone with respect to tribal common-law torts arising from alleged inequities attendant to the negotiations that preceded the contracts' formation or to their later implementation.[10] The *amici* States do not suggest that respondents should be denied a forum for their grievances against petitioner. Claims of racial discrimination could have been, and perhaps still can

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[10] It makes no difference whether petitioner eventually "consented" to tribal court adjudication of respondents' contract claim once the tribal court litigation commenced. Such consent, if it existed, was not embodied in the contracts themselves but instead resulted from a strategic determination to waive an otherwise available jurisdictional defense as to a particular claim. *Cf. Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002) (voluntarily invoking federal court jurisdiction through removal waived Eleventh Amendment immunity).

be, maintained in federal or state court under statutes, such as 42 U.S.C. § 1981 or 2000d, on whose case law the tribal courts relied in adjudicating the discrimination claim. Pet. A-53 – A-54, A-78 – A-81. This Court accordingly counseled in *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986), that it "and many state courts have long recognized that Indians share [an] interest in access to the courts, and that tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country." *Id.* at 888. This admonition should have been heeded by the courts below.

## CONCLUSION

The court of appeals' judgment should be reversed and this matter remanded for further proceedings.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

PLAINS COMMERCE BANK, Petitioner,

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG, LILA LONG, Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

## BRIEF FOR IDAHO COUNTY AND LEWIS COUNTY, IDAHO; CASS COUNTY AND MAHNOMEN COUNTY, MINNESOTA; *AMICI CURIAE*, IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE* COUNTIES

*Amici* are counties in two states, representative of counties throughout the United States, that provide a wide variety of services to their residents and lands within their boundaries under *especially* difficult circumstances. These counties include lands that were at one time within the boundaries of Indian reservations and lands that were at one time held in trust by the United States (and therefore not taxed). Congress later provided that much of this land be conveyed to individual Indians and to others, with most ultimately passing into fee ownership. The core of this policy was the General Allotment Act of 1887, 24 Stat. 388, but

other acts of Congress implemented that policy in specific areas of the Country or to particular tribes and bands.

One group of these counties is within the State of Minnesota, with the Nelson Act of 1889, 25 Stat. 642, implementing the General Allotment Act. Mahnomen County, Minnesota, and Cass County, Minnesota, are representative of these counties in the State of Minnesota and counties similarly situated throughout the United States.

Other *Amici* counties, Idaho County, Idaho, and Lewis County, Idaho, are representative of counties in the State of Idaho and counties similarly situated throughout the United States, that face unresolved claims with reference to reservation status.

As this Court has often noted, trust lands and fee lands are scattered throughout the counties, some of which are owned by Indians and Indian tribes. The history of each area is, of course, as varied and diverse as Federal Indian Policy, with one exception. All of these counties have routinely taxed fee lands to provide services to the area and the residents in the area. And all of the counties have less tax base upon which to rely because trust land, of course, is not taxable.

The level and cost of services provided by the counties has increased, as has been true of government services more generally. Landowners as taxpayers have often and understandably resisted increases in property taxes to provide such services.

In all of the *Amici* counties, the services required by the areas occupied by Indian tribes have increased to a greatly disproportionate degree. This is true for two main reasons. First, as noted above, many lands are trust lands and are not subject to property taxes, which is the primary, traditional source of funding for counties. Second, more and more tribes are engaged in activities such as casino gambling, which has a higher than proportionate impact on services by bringing large numbers of nonresidents to temporarily visit or stay in the counties. Road cost is one example of an area in which these impacts are greater than those associated with the more usual activities of residents on their lands. The problem is cumulative; bringing higher costs to counties, with a taxable land base which already includes trust lands, which do not bear the costs ratably (while complicating further the administrative process of assessing and collecting taxes). For example, a few years ago, in Mahnomen County, Minnesota, the total taxes collected by the county per year increased by a significant percentage due to casino-related expenditures. And these facts constitute only part of the difficult circumstances in which these counties find themselves.

The other part of the equation is the part directly related to this case: namely, the *uncertainty* regarding the scope of tribal jurisdiction over nonmembers that continues to undermine the quality of life and the economic development in all of these areas, despite the best efforts of this Court. The fact of the matter is that some, unfortunately, continue to ignore and abuse the general rules of this Court

limiting the jurisdiction of Indian tribes over nonmembers, as this case attests.

In this regard, the concern of *Amici* can be simply stated. Unless this Court establishes a bright-line rule, the precise limits of tribal adjudicatory jurisdiction over nonmembers, especially within the context of the consent exception, will continue to be ignored, circumvented or otherwise made meaningless. Economic development, upon which counties rely to continue to meet the demanding costs of service to all county residents, will remain dormant as it has in the past four decades. Hundreds of millions of dollars will continue to be expended testing the limits of the consent exception and the scope of tribal civil adjudicatory jurisdiction, as they have been expended in the decades since the 1960s testing the limits of tribal jurisdiction over non-Indians.

*Amici Curiae* submit that the solution to this dilemma can be found in the Opinions of this Court in *Nevada v. Hicks*, 533 U.S. 353 (2001).

## SUMMARY OF ARGUMENT

The residents and businesses need a bright-line rule regarding when they are subject to the jurisdiction of a tribal court. With a clear rule, residents and business can manage their affairs accordingly. Thus, this Court should use this case to reaffirm that tribal courts do not have adjudicatory jurisdiction over non-members.

## ARGUMENT

### I. THIS COURT SHOULD ESTABLISH A BRIGHT-LINE RULE THAT PRECLUDES TRIBAL ADJUDICATORY JURISDICTION

A bright-line rule that precludes tribal adjudicatory jurisdiction will benefit all of the residents of *Amici* counties, those counties similarly situated throughout the United States providing services under especially difficult circumstances, and all others that do business there. First, background for the especially difficult circumstances and second, support for a solution to resolve at least this dilemma.

#### A. Mahnomen County, Minnesota and Cass County, Minnesota

Mahnomen County is located in northwestern Minnesota. The county lies wholly within the boundaries of the original White Earth Reservation, which was created by treaty in 1867. *See* Treaty of March 19, 1867 with the Chippewa of the Mississippi, 16 Stat. 719. Two other Minnesota counties, Becker County and Clearwater County also partially lie within those boundaries.

Originally comprising 825,000 acres, the White Earth Reservation was divided up and parceled out to individual tribal members in 1889, when Congress enacted legislation known as the Nelson Act, 25 Stat. 642, to implement the General Allotment Act of 1887, 24 Stat. 388. The federal government, in implementing the Nelson Act initially issued only trust patents. In 1906, however, Congress passed the Clapp Amendment to the General Allotment Act, 34

Stat. 325, 353, *as amended by* Act of March 1, 1907, 34 Stat. 1015, 1034, to provide that adult allottees received their White Earth Reservation allotments in fee rather than trust. Within three years, title to much of the allotted land had been sold or mortgaged.

Current census data reflects the opening of the reservation to non-Indian ownership. In 1990, only one fourth of Mahnomen County residents claimed American Indian heritage. Land ownership is likewise overwhelmingly owned today by non-tribe members—approximately eighty-five percent of land within Mahnomen County is owned by non-tribe members.

The especially difficult circumstances of providing services under these conditions in Mahnomen County, Minnesota, is compounded by the fact that the county is currently enmeshed with the local tribal council over the tax status of the tribe's casino. The tribe stopped paying property taxes due on the casino in 2005, even though the tribe holds title in fee. The parties have been litigating in state and federal court over this issue. If the tribe's fee-to-trust application is ultimately granted, a tax exemption will extend to the county's largest employer and what is otherwise by far the most valuable commercial property in the county.

Cass County, Minnesota, shares a history similar to that of Mahnomen County with reference to the 1889 Nelson Act, including land and population figures. Approximately twelve percent of the population claims American Indian heritage and 15,500 acres of land is held in trust for the Leech Lake Tribe. In addition, the reservation status of

this area is also unresolved, adding to the uncertainty.

### B. Idaho County, Idaho and Lewis County, Idaho

Idaho County and Lewis County are two counties in the State of Idaho with jurisdiction that conflicts and overlaps with the 1863 Nez Perce Reservation. These counties belong to the North Central Idaho Jurisdictional Alliance. The North Central Idaho Jurisdictional Alliance is an unincorporated association; its members have included 3 counties, 8 cities, 3 school districts and 7 highway districts in north central Idaho whose geographical boundaries include land which was within the Nez Perce Indian Reservation as it existed prior to 1894. The purpose of the North Central Idaho Jurisdictional Alliance is to provide an organization to foster cooperation between its members and to focus their efforts directed toward obtaining an adjudication of their jurisdictional authority in relationship to the jurisdictional authority of the United States and the Nez Perce Tribe.

In 1894, the Nez Perce Tribe ceded approximately 550,000 acres of land to the United States government. Today, approximately 90 percent of the ceded land is owned by non-members and 90 percent of the population is not enrolled in the Nez Perce Tribe. The Nez Perce Tribe claims sovereign governmental authority over all ceded land, some of which is within the geographic boundaries of the members of the *Amici* counties. The general interests of the counties concern conflicting and

overlapping jurisdictional issues between the State, counties, the United States and the Nez Perce Tribe. The specific concerns have been identified above.

The issue of the reservation status of the original 1863 Nez Perce Reservation is important to the Counties, the State of Idaho, the Nez Perce Tribe and the United States. The counties support the rationale and holding of the opinion of the Idaho district court in *In re Snake River Basin Adjudication (SRBA)*. In two orders in that case, Presiding Judge Barry Wood made it clear that the original 1863 Nez Perce Reservation was disestablished by a subsequent act of Congress. *In re SRBA*, No. 39576 (5th Jud. Dist. County of Twin Falls Nov. 10, 1999) (Order on Motion to Strike, Motion to Supplement the Record and Motions for Summary Judgment); *In re SRBA*, No. 39576 (5th Jud. Dist. County of Twin Falls Jan. 21, 2000) (Order on United States' Motion to Alter or Amend Judgment or Alternatively for an Evidentiary Hearing). Judge Wood squarely rejected the arguments of the United States that the 1863 Nez Perce Reservation continued to exist, as it had prior to the 1894 cession.

As in the past, however, the United States persisted in its quest to resurrect the reservation boundaries of the original Nez Perce Reservation in a series of criminal cases in which the participation of the State of Idaho and the counties was limited. *United States v. Scott*, No. CR98-001-N-EJL (D. Idaho May 27, 1998); *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001); *Lewis Co., Idaho v. Allen*, 169 F.3d 509 (9th Cir. 1998). The Ninth Circuit at least arguably

resurrected the 1863 Nez Perce Reservation boundaries, without even addressing the opinion of Judge Wood or the position of the State of Idaho and the *Amici* counties (no effective voice in the process). To date, this conflict between the Ninth Circuit Court of Appeals and the state courts in Idaho has not been resolved.[1]

### C. The Opinions in *Nevada v. Hicks* Support a Bright-Line Rule That Precludes Tribal Adjudicatory Jurisdiction.

1. Early on in this dispute regarding the scope of tribal jurisdiction over nonmembers, *Oliphant v. Schlie*, 544 F.2d 1007, 1015 (9th Cir. 1976) (Kennedy, J., dissenting), *rev'd sub nom. Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), recognized the importance of a proper historical perspective. "As the Supreme Court recognized almost a century ago, only two truly sovereign entities exist at any place within the geographical limits of the United States: the federal government and the states of the union. *United States v. Kagama*, 118 U.S. 375, 379 (1886)." Other cases support a similar proposition regarding the importance of the distinction between tribal members and nonmembers in the process. *See Hicks*, 533 U.S. at 379 (Souter, J., concurring and citing *Oliphant*,

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[1] *Amici* counties will be pleasantly surprised if the United States, as *Amicus Curiae*, does not make an appearance in this case arguing that Petitioner has consented to tribal adjudicatory jurisdiction and that consent solves the problem. In any event, that argument should be rejected.

544 F.2d at 1015) (Kennedy, J., dissenting); *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) ("after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' 450 U.S. at 564 and is therefore not inherent").

2. Building on that historical perspective, the pivotal observation of the Court in *Hicks* adds special emphasis to the fact that this Court has never held that a tribal court has jurisdiction over a nonmember defendant:

> We avoided the question whether tribes may generally adjudicate against nonmembers claims arising from on-reservation transactions, and we have never held that tribal court had jurisdiction over a nonmember defendant.

533 U.S. at 358 n.2 (Scalia, J.). This fact, in the proper historical perspective, forms the basis for a bright line to resolve the issue in this case. In this respect, Justice Scalia's observation points the way.

If this bright line needs additional support, that support can be found throughout the concurring Opinion of Justice Souter in *Hicks*. The reference to the "membership status" of the unconsenting party as the "primary jurisdictional fact," 533 U.S. at 382, is directly on point. Similarly, the discussion regarding the "real, practical consequence" and the ability of nonmembers to *know* where tribal jurisdiction begins and ends, *Id.* at 383-85, completes the equation. In this respect, Justice Souter's opinion lights the path.

Moreover, the Court in *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997), pointed out that there are forums available as competent alternatives to tribal court with reference to criminal proceedings. Those same forums, state or federal courts, are also available with reference to tribal adjudicatory jurisdiction in cases like this.

At the end of the day, there are no principled reasons in *Hicks* or in any other Opinion of this Court to depart from the "never held" observation of this Court set forth in *Hicks*, 533 U.S. at 358 n.2. A principled conclusion like that fashioned by the Court in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005) or *Strate*, 520 U.S. at 459, is also called for in this case. Clearly, that conclusion is sorely needed and justifiable under the circumstances.

## CONCLUSION

The court of appeals' judgment should be reversed and this matter remanded for further proceedings.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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In The

# Supreme Court of the United States

PLAINS COMMERCE BANK,

*Petitioner,*

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG, LILA LONG,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER, PLAINS COMMERCE BANK

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## *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER, PLAINS COMMERCE BANK

This *amicus curiae* brief is presented on behalf of Mountain States Legal Foundation, a non-profit, public interest law firm with approximately 36,000 members, in support of the Petitioner, Plains Commerce Bank.[1]

## INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF has 36,000 members, many of whom live and conduct business on or near Indian reservations. These members are very concerned with the civil and criminal jurisdiction of Indian tribes over them, and the impact that

[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief; all counsel have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

tribal jurisdiction has on their everyday lives and business dealings.

Indeed, those members are generally unfamiliar with the customs, traditions, and social norms that govern tribal justice. Moreover, that system of justice is foreign to them in every way, and dissimilar from Anglo-American notions of justice and due process. Furthermore, the application, by tribal courts, of tribal substantive law, including tribal common law, to MSLF's members is inherently unfair and inconsistent with rights guaranteed by the U.S. Constitution. MSLF members wish to trade and do business with American Indians and American Indian tribes, but they object to the enforcement of tribal laws against them in tribal courts.

MSLF and its members believe that the only proper forum in which to litigate legal disputes between tribal members and non-members is State and federal courts, which apply law to all citizens, tribal members and non-members alike, in accordance with the federal and State constitutions and pursuant to well-established, documented, and verifiable law and procedure.

The decision of the Eighth Circuit Court of Appeals jeopardizes the constitutional rights of MSLF's members, constitutes dangerous precedent, and is contrary to the holdings of this Court.

## STATEMENT OF THE CASE

*Amicus Curiae* adopts the Statement of the Case submitted by Petitioner, Plains Commerce Bank, but supplements that Statement by noting that the tribal court sought first to adjudicate federal causes of action based on its misunderstanding of its jurisdiction. Indeed, instructions concerning federal claims of discrimination were submitted to the jury. That tribal customs, traditions, and social norms controlled was argued for the first time in the tribal appellate court by the Tribe in an *amicus* brief. The tribal appellate court, adopting the Tribe's *amicus* argument, held that tribal customs, traditions, and social norms govern the discrimination claim and affirmed the tribal trial court. There was no opportunity to challenge the Tribe's explanation of those customs, traditions, and social norms or whether its view of the unwritten cultural standards of hundreds of years ago, as passed down orally from generation to generation, was accurate.

## SUMMARY OF ARGUMENT

Litigation of any legal dispute between a tribal member and a non-member in tribal court is inherently unfair and prejudicial to the non-member. Because

tribal law is unknowable to non-members, non-members may not conform their conduct to that law.

This is so because tribal law is based on the customs, traditions, and social norms of the indigenous peoples who occupied North America before contact with Europeans. It is largely unwritten, handed down orally from generation to generation, depends on memory, and varies from tribe to tribe. Because much of it has been forgotten, tribes endeavor to reacquire their customs, traditions, and social norms, as well as their language. Consequently, the precise nature of their cultural foundations is very subjective and highly debatable. American Indians of the 1860s and 1870s – for whom these traditions, customs, and social norms were a part of daily life before their diminution due to the arrival of Europeans in the American West – left no records. Much of what they knew died with them. Even scholars of legal anthropology are unable to puzzle out this cultural heritage as it relates to tribal justice. It is little wonder that ordinary citizens, including many tribal members, are mystified regarding tribal law.

Additionally, those traditions, customs, and social norms are entirely dissimilar from Anglo-American notions of law, justice, and redress of grievances. They derive from a society, social mores, and notions of morality that differ greatly from those of America's Founding Fathers. Furthermore, tribal forums are extra-constitutional. They were not contemplated by the Constitution. And, the concepts of justice they

employ are foreign to non-Indians and Indian members of different tribes. Indeed, the United States or State Constitutions do not apply to tribal courts.

These differences are particularly critical regarding aspects of the United States Constitution that all Americans take for granted, such as the Separation of Powers Doctrine, the Doctrine of Checks and Balances, the Due Process Clause, and the First Amendment's Establishment Clause. For example, in many tribal courts, the court and its judges are subordinate and answerable to the political branch. Moreover, religion and spirituality are infused into and intertwined with tribal notions of justice.

Congress, under its plenary power, has the authority to establish, reduce, or enlarge the inherent sovereignty of tribes, including the jurisdiction of tribal laws and courts. Therefore, if tribal courts have jurisdiction over non-members, it is only because Congress conferred it, either explicitly or by inaction in allowing tribes to retain it. Consequently, if tribal courts have jurisdiction over non-members, Congress unconstitutionally conferred that power, contrary to the Due Process Clause of the Fifth Amendment.

Tribal members have an appropriate forum to adjudicate legal disputes with non-members. All tribal members and non-members are citizens of the United States and the State in which they reside. All are protected by the written laws and well-established and documented common law of those governments. All are familiar with the particularized and codified

procedures by which constitutional federal and state courts apply law evenly to all before them. Therefore, state and federal courts are the only fair and impartial tribunals in which legal disputes between tribal members and non-members may be litigated.

This Court should reverse the Eighth Circuit Court of Appeals and hold that the Cheyenne River Sioux Tribal Court did not have jurisdiction over Plains Commerce Bank.

## ARGUMENT

### I. LITIGATION OF ANY DISPUTE BETWEEN A TRIBE OR TRIBAL MEMBER AND A NON-MEMBER IN TRIBAL COURT IS IN DEROGATION OF ALL CONCEPTS OF DUE PROCESS OF LAW.

#### A. TRIBAL LAW IS BASED ON THE "VALUES, MORES, AND NORMS" OF A PARTICULAR TRIBE, OFTEN HANDED DOWN ORALLY FROM ONE GENERATION TO ANOTHER.

There has been "little writing in law journals concerning the content of tribal codes and constitutions, the procedures of tribal courts, or the distinctively Indian characteristics of criminal, civil, or administrative law on reservations."[2] What little

[2] Robert D. Cooter and Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts, Part*

(Continued on following page)

writing there has been documents the quite different substance, procedure, and character of tribal laws and tribal courts from those of the United States and the several states. "Tribal common law is based on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices."[3] In fact, "in many tribes, information, beliefs, and customs are handed down orally or by example from one generation to another."[4] "[A]ll tribal courts selectively enforce social norms and few tribal courts systematically refine precedent."[5] Accordingly, "Indian common law evolves orally and informally,"[6] and constitutes a "folk common law in most tribes [that] . . . is tribe specific."[7] It often develops orally "through networks among tribal officials and intellectuals."[8]

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*I*, 46 American Journal of Comparative Law 287, 327 (1998) (*Indian Common Law I*). The authors interviewed tribal judges and Indian officials on 37 reservations, in addition to consulting Indian scholars. For this ethnographic field work in tribal laws, the authors received the Max Planck Research Prize in Bonn in 1994. This was the second time a lawyer received the prize and the first time it was awarded for anthropology of law.

[3] Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 Judicature 126, 130 (1995) (*Indigenous Justice Systems*).

[4] *Id.* at 131.

[5] *Indian Common Law I* at 294.

[6] *Id.* at 327.

[7] *Id.* at 328.

[8] Robert D. Cooter and Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts, Part II*, 46 American Journal of Comparative Law 509, 562 (1998) (*Indian Common Law II*).

This reliance on values, mores, and norms holds true with respect to codified and written law, even when modeled after Anglo-American law. "Tribal law is distinctly more Indian as applied than as written."[9] Thus, "custom is the 'underground' law of the courts in the sense that it affects many decisions without being explicitly recognized or systematized in writing."[10]

"Thus, in essence, Indian customary law develops into Indian common law, which sometimes resembles the Anglo-American common law process, sometimes not," though the "latter is more frequent."[11] And "the existence of customary law is a fact that influences many cases."[12] For example, "social norms influence the way people understand contractual obligations, property rights, and fair punishments."[13] But "most customs – whether Indian or Anglo-American – are not suitable for law enforcement."[14] Nonetheless, "because reservation life involves repeated interactions among people, many of whom are relatives," "sociological tradition predicts that custom will dominate tribal law."[15]

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[9] *Id.* at 563.

[10] *Id.*

[11] *Id.*

[12] *Indian Common Law I* at 329.

[13] *Id.* at 329.

[14] *Id.*

[15] *Indian Common Law II* at 510.

## B. TRIBAL LAWS AND COURTS ARE NOT CONSTRAINED BY THE UNITED STATES CONSTITUTION.

Under the United States Constitution, America's federal republic contemplates only two sovereign governments – the United States and the several States. Each of these sovereigns must respect the proper sphere of the other, and citizens of one sovereign are citizens of the other, possessing rights and duties as to both.[16] Therefore, the Bill of Rights and the Fourteenth Amendment protect the citizens of a sovereign state when before another sovereign's tribunal.

But the same is not true for Tribes, because Indian Tribes retain inherent sovereignty to control their own internal relations and to preserve their unique customs and social behavior.[17] That is, tribal legislation and adjudication, pursuant to that inherent sovereign power, are not constrained by the Bill of Rights because the Tribes pre-dated the Constitution and are neither States nor part of the federal government.[18] This distinction applies equally in the civil context as well as in the criminal.

To be sure, the Indian Civil Rights Act ("ICRA") statutorily imposes most of the Bill of Rights on

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[16] *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring).

[17] *Duro v. Reina*, 495 U.S. 676, 685-86 (1990).

[18] *Talton v. Mayes*, 163 U.S. 376, 382 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

Indian Tribes.[19] But a statutory right is not the same as a constitutional right. Therefore, the only method to appeal to federal court for conviction of violations of the ICRA is through a writ of *habeas corpus*,[20] which is available only in matters of criminal law to review unlawful detention.[21] Thus, a writ is not available to bring challenges in civil court proceedings that allege a Due Process or Equal Protection violation. Moreover, because the rights set forth in the ICRA are statutory, not constitutional, courts are not bound by the decisions of the Supreme Court with respect to the United States Constitution. Rather, a new body of case law is being developed based on the ICRA.[22] In the process, tribal courts and federal courts are free to interpret these statutes in accordance with "the unique customs, languages, and usages of the tribes [involved],[23] which is particularly problematic because '[t]ribal courts are often subordinated to the political branches of tribal government.' "[24]

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[19] 25 U.S.C. § 1301 *et seq.*

[20] *Martinez*, 436 U.S. at 59-60.

[21] 25 U.S.C. § 1303 ("*habeas corpus* shall be available . . . to test the legality of his detention by order of an Indian Tribe").

[22] *See, e.g., Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079, 1082-83 (8th Cir. 1975), and *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988) (holding generally that the guarantees of due process and equal protection should be applied flexibly and adapted to the tribal context).

[23] *Duro*, 495 U.S. at 693.

[24] *Id.*

### C. TRIBAL "VALUES, MORES AND NORMS" DIFFER MARKEDLY FROM THOSE OF THE ANGLO-AMERICAN LEGAL SYSTEM.

#### 1. Tribal law and Anglo-American law are based on entirely different paradigms.

The Anglo-American paradigm of common law is vertical, that is, the structure is upward, with decision-making limited to a few, and is applied through an adversarial system with a winner and a loser decided by a judge or jury:

> In the American paradigm, the law is applied through an adversarial system that places two differing parties in the courtroom to determine a defendant's guilt or innocence, or to declare the winner or loser in a civil case. It focuses on one aspect of a problem, the act involved, which is discussed through adversarial fact-finding. The Court provides the forum for testing the evidence presented from the differing perspectives and objectives of the parties. Interaction between parties is minimized and remains hostile throughout.[25]

In contrast is the Indian paradigm of justice, which relies more on a holistic policy by indigenous cultures of small, closely-knit bands, focuses on repairing relations, and strives for consensus:

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[25] *Indigenous Justice Systems* at 126.

> The indigenous justice paradigm is based on a holistic philosophy and the worldview of the aboriginal inhabitants of North America. These systems are guided by the unwritten customary laws, traditions, and practices that are learned primarily by example and through oral teachings of tribal elders. . . . The methods used are based on concepts of restorative and reparative justice and the principles of healing and living in harmony. . . . Restorative principles refer to the mending process for renewal of damaged personal and communal relationships, [with] the victim as the focal point, to heal and renew the victim's physical emotional, mental and spiritual well-being. It also involves deliberate acts by the offender to regain dignity and trust. . . . These are necessary for the offender and victim to save face and to restore the personal and community harmony.[26]

Thus, in the American Indian system, "dispute resolution in tribes aims at repairing relationships,"[27] which "requires going deeper into the dispute than the immediate cause of the disagreements," such as "the character and feelings of the parties."[28] On the other hand, in the Anglo-American system, "rules of procedure in federal and state courts narrow the

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[26] *Id.* at 125-27.

[27] *Indian Common Law I* at 324.

[28] *Id.*

dispute to the specific wrongdoing alleged by the plaintiff."[29]

Moreover, the Anglo-American system considers separation of the judicial, executive, and legislative branches essential to fairness and justice, as is the separation of church and state. The opposite is true of the American Indian systems of justice:

> In the American justice paradigm, separation of powers and separation of church and state are essential doctrines to ensure that justice occurs uncontaminated by politics and religion. For many tribes, law and justice are a part of a whole that prescribes a way of life. . . . Restoring spirituality and cleansing one's soul are essential to the healing process for everyone involved in a conflict.[30]

As a result, "the separation of powers doctrines," so critical to Anglo-American jurisprudence, "are difficult for tribes to embrace."[31] In fact, "many [tribal courts] find it impossible to make such distinctions."[32] For example, many "tribal council[s] act[ ] as appeals courts"[33] and "[o]n most reservations, the council can

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[29] *Id.*

[30] *Indigenous Justice Systems* at 127.

[31] *Id.*

[32] *Id.*

[33] *Indian Common Law I* at 317.

impeach or dismiss judges, and politicians sometimes use this power to force judges to resign."[34]

The two systems even differ in how law itself is developed and promulgated. "[D]ispute resolution in the tribes" is the "application of inchoate social norms," which are "not fully explicit."[35] In contrast to this "social law," "Anglo-American common law stresses the reasoned elaboration of rules by judges,"[36] which "aspires to an explicit statement of rules, which exist in the decisions of judges, not just the practices of people."[37] Therefore, because "predictability and boundedness," are the hallmarks of the Anglo-American system of law, "common law rules are promulgated authoritatively" to create "institutional memory."[38] "Consequently, changing common law rules requires an official revision."[39]

In contrast, under the American Indian system, "social norms are not promulgated, so they can change without an official revision."[40] Therefore, "[m]ost tribal judges cannot consult records and rules and principles articulated in past decisions in their

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[34] *Id.* at 318.

[35] *Id.* at 326-27.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

own courts."[41] Accordingly, "[c]ourts without adequate records must rely upon individual memory about past decisions," so that "Indian common law evolves orally and informally."[42] As a result, there is little that is predictable about the development, coherency, or consistency of the law applied by tribal courts. Indeed, there is "little evidence of a formal common law process similar to American state courts in any tribal court, except the Navajo."[43] In fact, "many tribal judges . . . want to stop far short of the Anglo-American common law process."[44]

### 2. Tribal courts apply substantive law in very different ways than do Anglo-American courts.

The fundamental differences in the approach to justice between the Anglo-American system and the American Indian system result in particular differences in substantive law. For example, while contracts in Anglo-American law require offer, acceptance, and consideration, contracts in Indian law "are valid by mutual consent," without either "writing, consideration, or witnesses . . . required."[45] Thus, "trust and reliance are the foundations of

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[41] *Id.* at 327.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 328.

[45] *Indian Common Law II* at 548.

contract exchange."[46] Because Anglo-American law goes to great lengths to ensure that innocent statements are not mistakenly taken to be contracts, and requires a bargained for exchange, not merely a promise, formality in contracts and the bargained for consideration is critical in Anglo-American contract jurisprudence. Indeed, at one time all enforceable contracts had to be written and under seal to assure that mere negotiations or casual statements did not bind parties. On the other hand, "customary laws among tribes afford few defenses or excuses for nonperformance of a promise."[47] Furthermore, "specific performance is the preferred remedy" because the Indian tradition "is not money oriented" but "aims at repairing the relationship between the parterns [sic] as the primary legal goal."[48]

"Many contract disputes that end up in tribal courts are brought by off-reservation creditors who lent money to Indians for the purchase of goods."[49] It is not surprising, given the differences in law and approach between tribal courts and State and Federal courts, that such "creditors sometimes fare badly in these disputes."[50] Under Indian tribal custom, what a non-member might have meant as an exploration of

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[46] *Id.*

[47] *Id.*

[48] *Id.* at 548-49.

[49] *Id.* at 549.

[50] *Id.*

the possibility of terms, or simple discussions or negotiation of terms, becomes binding under some tribal custom and tribal common law totally unknown to a non-member.

In the area of injury to person or property, that is, tort and criminal law, there is a very different focus in tribal courts than that in courts of the States and United States. In fact, in the indigenous systems, "criminal and civil sanctions were not sharply distinguished. . . ."[51] Indeed, "perusing Navajo court records does not suggest that tort compensation occupies a central place in legal disputes."[52] Moreover, to the degree that tort law exists, "tribal courts place more emphasis . . . on reconciliation and repairing relationships."[53]

Additionally, "tribal tort law focuses upon causation more than intent."[54] "There's much less psychology in Indian law," thus the maxim "he did it[,] that's enough" prevails.[55] As a result, "tribal tort law looks more like strict liability than negligence."[56] Furthermore, Indian tort law, like all other Indian law, focuses on custom and tradition. For example, people of the White Mountain Apache Tribe "have their own

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[51] *Id.* at 552.

[52] *Id.*

[53] *Id.* at 563.

[54] *Id.* at 552.

[55] *Id.*

[56] *Id.*

ideas about what constitutes negligence."[57] "To illustrate, stray animals are considered a threat and a nuisance, . . . but owners of horses and cows that stray onto roads and collide with vehicles are not held liable. . . ."[58] In a similar example, Navajo jurors "award damages in light of the specifics of Navajo culture, such as marital practices and family structure."[59] Likewise, judges on the Blackfeet tribal court "take specific cultural considerations into account when awarding damages."[60]

Utilizing cultural resources as part of their jurisprudence is particularly problematic for many tribal judges, because, though "some of the judges were deeply rooted in the culture where they presided in court, . . . others were outsiders."[61] Therefore, many tribal judges "actively seek counsel on custom, . . . by assembling elders to discuss custom or tradition."[62] Of course, these elders are, in effect, testifying to facts that are not subject to cross-examination or impeachment. Therefore, tribal "values, mores, and norms" are not easily ascertained even by the judges who must apply them.

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[57] *Id.*

[58] *Id.*

[59] *Indian Common Law I* at 329.

[60] *Id.*

[61] *Id.* at 323.

[62] *Id.* at 323-24.

## D. TRIBAL CULTURE IS UNKNOWABLE TO NON-MEMBERS TO WHOM TRIBAL COURTS SEEK TO APPLY IT.

Tribal customs, traditions, and social norms are unwritten and known only to those steeped in the culture of a particular tribe. There is, therefore, no mechanism by which laws based on these customs, traditions, and social norms may be known to non-members or their lawyers. Thus, there is no notice of the law and standards to which a non-member, who enters into a consensual, on-reservation agreement, will by held accountable by a tribal court. Indeed, even many tribal court judges have no independent knowledge of these customs, traditions, and social norms. Instead, they must consult the elders of the tribe.

In fact, much of the culture of pre-contact indigenous peoples has been lost as a result of expansionist policies of the United States and federal Indian policies over the years, particularly allotment and assimilation.[63] It is well known that many Indian tribes have lost many aspects of their culture, religion, and

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[63] "In the 1940s and 1950s the last Indians died who could recall life before confinement to reservations, so retrospectives like Llewellyn and Hoebel's became impossible." *Indian Common Law I*, at 291. The reference is to K.N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, University of Oklahoma Press (1941, 1983). The authors used historical records and recollections of elderly Indians to reconstruct Cheyenne law as it existed during the 1860s and 1870s.

language. It is also true that many tribes are trying to rediscover and preserve what has been lost. "Indian tribes now take every measure conceivable to preserve indigenous cultures and restore lost cultural knowledge and practices."[64] "But this development of applying customary law in tribal courts is new and under-theorized."[65] Consequently, "in a practical sense . . . many tribes have not yet recovered . . . customs and traditions that [are] useful in this regard."[66]

Thus, it is likely that most tribal members do not know the customs, traditions, and social norms that will govern them in tribal court, that is, until the tribal court issues a judgment. As a result, tribal courts utilize a process that is essentially unfair to them, and much more so to non-members. Tribal law is vague and uncertain so that it fails to articulate comprehensible standards to which the conduct of a person, including tribal members, must conform.

To make matters worse, there are 562 federally recognized Indian Tribes, all with their own customs, traditions, and social norms.[67] Some tribes occupy

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[64] Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, Indigenous Law and Policy Center Working Paper, Indigenous Law and Policy Center, Michigan State University College of Law (2006-04), at 6.

[65] *Id.*

[66] Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 Hous. L. Rev. 701, 728 (2006).

[67] 67 Fed. Reg. 46328 (2002).

reservations with other tribes, such as the Northern Arapaho and the Eastern Shoshone on the Wind River Reservation, the Assiniboine and Gros Ventre on the Fort Belknap Reservation, the Assiniboine and the Sioux on the Fort Peck reservation. These tribes, though sharing some customs, traditions, and social norms, do not share all aspects of their respective cultures.

For example, the Northern Arapaho and Eastern Shoshone were traditional enemies, one from the Algonquian language group, the other from the Uzo-Aztecan. They had different allies and lived in different areas. The permanent presence of the Northern Arapaho on the Eastern Shoshone's reservation was bitterly resented, resulting in a lawsuit by the Eastern Shoshone against the United States, which located the Northern Arapaho there.[68] Yet they share a reservation and one tribal court that answers to a Joint Business Council, consisting of the combined councils of the two tribes. It is difficult to imagine how that tribal court applies custom, tradition, and social norms to govern conduct between litigants from opposing tribes.

Moreover, there are approximately 250 tribal courts in the country.[69] Often, there are many in one

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[68] *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937).

[69] Bureau of Justice Assistance, U.S. Dep't of Justice, *Executive Summary, Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America*, 5-6 (2005).

State. For example, there are eleven Indian Tribes living on seven reservations in Montana.[70] It is impossible for a non-member to have even a clue as to the standards of conduct to which he may be held in any of those tribal courts.

### E. IF TRIBAL COURTS HAVE JURISDICTION OVER NON-MEMBERS, EXERCISE OF THAT JURISDICTION VIOLATES NON-MEMBERS' RIGHTS TO DUE PROCESS OF LAW.

#### 1. Tribal law is so vague that a non-member cannot know what it is or when it applies.

"A statute [or other law] which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[71] Therefore, as demonstrated above, American Indian law as applied by tribal courts is contrary to the Anglo-American concept of Due Process of Law, as set forth in the Fifth and Fourteenth Amendments to the

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[70] http://leg.mt.gov/css/publications/research/past_interim/handbook.asp#montanas. The tribes are the Salish-Kootenai, Flathead, Crow, Blackfeet, Assiniboine, Sioux, Gros Ventre, Northern Cheyenne, and Cree-Chippewa.

[71] *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

United States Constitution, and as adopted by every State constitution.

### 2. If tribal courts have jurisdiction over non-members, it is only because Congress has authorized that jurisdiction.

Congress' plenary power over Indian tribes enables Congress to "enact legislation that both restricts, and in turn, relaxes those restrictions on tribal sovereign authority."[72] Therefore, if a tribe retains the inherent sovereignty to try a non-member, it is only because Congress permits it to do so. Thus, it is not the Tribe, but Congress that subjects non-members to tribal jurisdiction.

### 3. This Court should not construe tribal sovereignty in a manner that renders its application unconstitutional.

This Court must construe the inherent sovereignty of tribes in a manner that precludes exercise of jurisdiction by tribal courts over non-members. Any other construction would result in a finding that Congress had acted unconstitutionally to confer such jurisdiction on tribal courts. Wherever possible, this

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[72] *United States v. Lara*, 541 U.S. 193, 202 (2004).

Court must avoid constructions of congressional action that render that action unconstitutional.[73]

## F. MEMBERS OF THIS COURT HAVE AGREED THAT NON-MEMBERS SHOULD NOT BE SUBJECT TO LITIGATION IN TRIBAL COURT.

Justice Rehnquist, writing for the Court in *Oliphant*,[74] made clear that it would not be fair to allow Tribes to try non-members criminally because to do so would be to impose tribal law "over aliens and strangers, over members of a community separated by race [and] tradition."[75] Indeed, tribal jurisdiction would "seek to impose [on non-members] an external and unknown code . . . which judges them by a standard made by others and not for them."[76] He concluded that a tribal court "tries [non-members] not by their peers, nor by the customs of their people, nor

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[73] *Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory*, 325 U.S. 450, 470 (1945).

[74] *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978).

[75] *Id.* at 210. Though Justice Rehnquist was quoting from *Ex Parte Crow Dog*, 109 U.S. 556 (1883), which considered the justice of trying Indians in federal court for crimes against Indians in Indian country, before the enactment of the Major Crimes Act, he also stated that these words "apply equally strongly against the validity of respondents' contention that Indian tribes . . . retain the power to try non-Indians according to their own customs and procedure." *Id.* at 211.

[76] *Id.*

the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect understanding."[77]

Justice Kennedy, writing for the Court in *Duro*, reiterated this concern: "[W]e hesitate to adopt a view of tribal sovereignty that would single out another group of citizens – non-member Indians – for trial by political bodies that do not include them."[78] His concern was the unfairness of subjecting non-members to unfamiliar tribal customs and traditions:

> The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." It is significant that the Bill of Rights does not apply to Indian tribal governments. The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts.[79]

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[77] *Id.* at 211.

[78] *Duro*, 495 U.S. at 693.

[79] *Id.* (internal cites omitted).

Justice Souter, writing for himself and Justices Thomas and Kennedy, reiterated this theme with respect to civil jurisdiction in *Hicks*:[80] "The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given the special nature of Indian tribunals."[81] For example, "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes."[82] And "there is a definite trend by tribal courts toward the view that they have the leeway in interpreting the Indian Civil Rights Act's due process and equal protection clauses and need not follow the U.S. Supreme Court precedents 'jot for jot.'"[83] In addition, "[t]ribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges."[84] Also, "[t]ribal law is still frequently unwritten, being based instead on the values, mores, and norms of a tribe and expressed in its customs, traditions and practices, and is often handed down orally or by example from one generation to another . . . [that] would be unusually difficult for an outsider to sort

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[80] *Nevada v. Hicks*, 533 U.S. 353 (2001).

[81] *Id.* at 383 (Souter, J., concurring) (joined by Justices Thomas and Kennedy).

[82] *Id.*

[83] *Id.* at 384.

[84] *Id.*

out."[85] Finally, "[t]ribal courts are often subordinated to the political branches of tribal government."[86]

## II. TRIBAL SUBSTANTIVE LAW IS NOT A REGULATION CONTEMPLATED BY THE FIRST *MONTANA* EXCEPTION.

The consensual relations exception in *Montana* recognizes that tribes have jurisdiction to regulate consensual relations "through taxation, licensing, or other means."[87] The question here is whether "other means" includes tribal substantive law, statutory and common. The answer must be no, given the vast differences between Anglo-American and American Indian law and the due process and equal protection implications of those differences. And *Montana* itself *also* demonstrates that the answer must be no.

The types of regulations the court gave as examples were "taxation and licensing."[88] When this Court construes language, it generally follows the interpretative maxim *eiusdem generis*, which instructs, "[w]here general words, [such as 'other means'] follow specific words [such as 'taxation and licensing'] . . . the general words are construed to embrace only objects similar in nature to those objects enumerated

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[85] *Id.*

[86] *Id.*

[87] *Montana v. U.S.*, 450 U.S. 544, 565 (1980).

[88] *Id.*

by the preceding specific words."[89] Therefore, only forms of regulation similar in nature to "taxation and licensing" would come within the catch-all phrase "other means."

Thus, this Court used the phrase "taxation, licensing or other means" to describe methods by which tribes could regulate "commercial dealing, contracts, leases, or other arrangements."[90] Obviously, this is not adjudication at all, but only regulation. Furthermore, the phrase refers to very limited authority over a transaction, which might include the power to determine who may do business on a reservation and the qualifications and cost of, and locations for, doing business. Licensing and taxation cannot be read to include regulating conduct through the application of substantive law related to such transactions, such as contract law and tort law, which are totally unrelated to the terms this Court used.

Moreover, licensing, taxation, permitting, and so on is only legislative. Adjudication by application of either unwritten law or customary law is not included. In fact, *Hicks* used the very term "legislative jurisdiction," to describe this licensing and permitting.[91]

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[89] *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 114-15 (2001).

[90] *Montana*, 450 U.S. at 565.

[91] *Hicks*, 533 U.S. at 367-68.

## III. TRIBAL MEMBERS ARE NOT WITHOUT A FAIR REMEDY FOR GRIEVANCES AGAINST NON-MEMBERS.

A non-member, particularly a non-Indian, cannot be a member of a tribe. He cannot know the customs and traditions of that tribe. The converse is not true, however. Like non-members, all tribal members are citizens of the United States and the County and State wherein they reside. Thus, there is a forum where all parties stand on an equal footing and where readily ascertainable law and procedure is well known to both, and in which a fair trial, subject to the constraints of the United States and State Constitutions exists: State courts and federal courts. These constitutional courts are the proper forum in which to address substantive legal disputes between tribal members and non-tribal members. Indeed, these are the forums to which all United States citizens, Indians, non-Indians, non-tribal members and tribal members may look to obtain fair and impartial justice.

## CONCLUSION

The Judgment of the Eighth Circuit Court of Appeals should be reversed by holding that tribal courts have no jurisdiction over non-members of that tribe for any purpose whatsoever.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 07-411

IN THE

# Supreme Court of the United States

PLAINS COMMERCE BANK,

*Petitioner,*

*v.*

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG, LILA LONG,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF OF THE NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, THE NAVAJO NATION, AND THE NORTHWEST INTERTRIBAL COURT SYSTEM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE *AMICI CURIAE*

*Amici curiae* are the National American Indian Court Judges Association ("NAICJA"), the Navajo Nation, and the Northwest Intertribal Court System ("NICS").[1]

NAICJA is a non-profit membership organization of present and former tribal court judges from approximately 400 tribal courts. Established in 1969, NAICJA is committed to fostering tribal justice systems by providing continuing education and developing resources to enhance the operation of tribal judiciaries. NAICJA also seeks to further public knowledge and understanding of tribal courts.

The Navajo Nation is the largest federally recognized Indian tribe in the United States with approximately 250,000 members. Covering over 27,000 square miles, the Navajo Nation's land extends into the states of Utah, Arizona and New Mexico. The Navajo Nation's court system is the most active tribal judicial system in the United States, handling a caseload of more than 30,000

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1. The parties have consented to the filing of this brief, and their consent forms have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

cases per year, a significant portion of which involve non-Indians.

NICS is a non-profit organization headquartered in Lynnwood, Washington. It is a consortium of several Western Washington federally-recognized Indian tribes: Confederated Tribes of the Chehalis Reservation, Muckleshoot Indian Tribe, Port Gamble S'Klallam Indian Tribe, Sauk-Suiattle Indian Tribe, Shoalwater Bay Indian Tribe, Skokomish Indian Tribe, and the Tulalip Tribe of Washington. NICS provides court services (including judges) to its member tribes, with the goal of promoting self-sufficient tribal communities. NICS is the oldest continually-existing intertribal court system in the country.

*Amici* are all directly affected by decisions defining the scope of tribal court jurisdiction over non-Indians. Because the Cheyenne Sioux Tribal Court properly exercised jurisdiction over the Plains Commerce Bank, *amici* respectfully suggest that the judgment below be affirmed.

## SUMMARY OF ARGUMENT

Federal policy fully supports Indian autonomy and self-governance and encourages the development of a strong tribal judiciary as a critical component of tribal autonomy. Tribal courts, including, for example, the Navajo Nation's courts and the courts supported by the Northwest Intertribal Court System, are functioning well. These courts serve a vital role in their communities, including the adjudication of disputes that arise in the course of the extensive and ever-growing

commerce between Indians and non-Indians taking place in Indian country. Tribal courts are an essential component in the protection and enforcement of the rights of Indians and non-Indians alike. An examination of tribal courts around the country reveals that the descriptions of tribal courts offered by Petitioner and its *amici* are simply inaccurate. Moreover, any decision further restricting the civil authority of tribal courts would undermine the fundamental principles of tribal sovereignty and self-governance that are at the heart of Congressional and Executive policy respecting the status of Indian nations.

## ARGUMENT

### I. Federal Legislative And Executive Policy Requires Strong Support Of Tribal Courts As Part Of The Fundamental National Policy Favoring Tribal Self-Governance.

The United States has long been "committed to a policy of supporting tribal self-government and self-determination." *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); *see, e.g.*, 25 U.S.C. § 3601(2) (United States trust responsibility for Indian tribes "includes the protection of the sovereignty of each tribal government"). Central to this commitment is respect for and support of tribal courts, as the power to administer justice and resolve civil disputes is inextricably tied to effective self-governance. As this Court has observed, "[t]ribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their

development." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) (citations omitted).

The Court has made it clear that it is not the role of the judiciary to "second-guess the political branches' own determinations" as to the status and role of tribes and tribal governments. *United States v. Lara*, 541 U.S. 193, 205 (2004). Indian law, therefore, "draws principally upon the treaties drawn and executed by the Executive Branch and *legislation passed by Congress*" and are the "instruments [that] form the backdrop for the intricate web of *judicially made* Indian law." *Id.* at 206 (emphases in original). It follows that questions of tribal court jurisdiction must be decided in a manner that furthers, or at least is consonant with, the relevant Congressional and Executive policy.

Legislation and Executive pronouncements over the past seventy years evidence a federal policy requiring that the United States promote Indian tribes' sovereignty and self-governance, in part through support of tribal courts and recognition of tribal court civil authority over both Indians and non-Indians in matters arising out of conduct in Indian country.

Federal legislation dating from the early 20th century shows Congressional acknowledgment of the critical role that tribal courts play in furthering the goal of tribal self-determination and self-governance. In 1934, Congress passed the Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.*, to encourage tribes to adopt constitutions. 25 U.S.C. § 476(a). Many of those constitutions provided for

the establishment of tribal courts. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 1 (1997).

Congress' passage of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301 *et seq.*, in 1968 further advanced the federal policy of promoting tribal autonomy and tribal court authority. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978) (one purpose of the ICRA was "to promote the well-established federal 'policy of furthering Indian self-government'"). The ICRA, among other things, extended most of the protections of the Bill of Rights to Indian tribes' exercise of their powers of self-government. 25 U.S.C. § 1302. The Act not only evidenced Congressional support for Indian tribes' exercise of governmental powers – including those powers that are exercised by tribal courts – but also expressly acknowledged that non-Indians as well as Indians could very well be subject, in appropriate circumstances, to tribal court jurisdiction. *See* 25 U.S.C. § 1302(8) (extending Act's guarantees to "any person" within tribal jurisdiction). The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.*, provided additional impetus for tribes to implement and expand their tribal courts.[2]

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2. Every President since President Nixon has taken steps to implement the strong federal policy supporting tribal self-government and self-determination, so that there would be a "new era in which the Indian future is decided by Indian acts and Indian decisions." President Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970); *see also* President Gerald R. Ford, Statement on Signing the Indian Self-Determination and Education Assistance Act (Jan. 4, 1975); President Jimmy Carter,

In particular, federal policy recognizes that the effective exercise of tribal autonomy and self-governance requires a strong and fully empowered judiciary. Congress made this clear in 1993, when it enacted the Indian Tribal Justice Act ("ITJA"), 25 U.S.C. §§ 3601 *et seq.*, "to assist the development of tribal judicial systems." S. Rep. No. 103-88, 1993 WL 304728, at *1 (July 15, 1993). Congress found that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." 25 U.S.C. § 3601(5); *see* S. Rep. No. 103-88, 1993 WL 304728, at *3 ("Tribal justice systems are critical to the maintenance and enhancement of the inherent and delegated sovereignty of tribal governments."). Significantly, the Senate Report accompanying that Act emphasized that "tribal courts are permanent institutions charged with resolving the rights and interests of *both Indian and non-Indian individuals*." S. Rep. No. 103-88, 1993 WL 304728, at *8 (emphasis added). The ITJA, perhaps more than any other single piece of legislation before it,

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Indian Education Programs Statement (July 25, 1978) (recognizing "special relationships between the Government and Indian people"); President Ronald Reagan, Statement on Indian Policy (Jan. 24, 1983); President George H.W. Bush, Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments (June 14, 1991); President William J. Clinton, Remarks to American Indian and Alaska Native Tribal Leaders (Apr. 29, 1994); President George W. Bush, Memorandum on Government-to-Government Relationship With Tribal Governments (Sept. 23, 2004). These documents are all available at www.presidency.ucsb.edu.

demonstrated Congressional acknowledgement that the policy of supporting tribal self-governance would be severely undermined if tribes lack the power to enforce their own laws over those whose conduct or consent brings them into Indian communities.[3] As the Senate Committee on Indian Affairs explained, "strong tribal justice systems are necessary both as a function of the exercise of tribal sovereignty and as a means to assure the fair and just administration of the laws enacted by tribal governing bodies and laws enacted by the Congress that require implementation by tribal governments." *Id.* at *3; *see* Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 Judicature 113, 113 (1995) ("Tribal authority for self-government includes the power to administer justice. Indeed, tribal justice systems are essential pieces of the mosaic of tribal self-governance.").[4]

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3. Among other things, the ITJA expressly provides that "[n]othing in this chapter shall be construed to . . . encroach upon or diminish in any way the inherent sovereign authority of each tribal government to . . . enact or enforce tribal laws . . . ." 25 U.S.C. § 3631.

4. Many other legislative enactments reflect Congress' endorsement of tribal court jurisdiction over Indians *and* non-Indians. *See, e.g.*, 12 U.S.C. § 1715z-13(g)(5) (authorizing federal government to bring mortgage foreclosure actions against Indians and non-Indian homeowners on reservations in tribal or federal court); 18 U.S.C. § 2265 (states must give full faith and credit to tribal domestic violence protection orders); 25 U.S.C. § 1911(a) (jurisdiction over enforcement of the Indian Child Welfare Act of 1978 is vested exclusively in tribal court for certain children); 25 U.S.C. § 1911(d) (states and United States must give full faith and credit to tribal public acts, records, and judicial proceedings applicable to Indian child custody); 25 U.S.C. § 2207 (Secretary of the Interior must give full faith and credit to tribal determinations made under

In 2000, Congress once again reinforced its support for the development of tribal courts when it enacted the Indian Tribal Justice Technical and Legal Assistance Act ("Assistance Act"), 25 U.S.C. §§ 3651 *et seq.* In the accompanying Senate Report, the Senate Committee on Indian Affairs reiterated: "Along with other factors, stable tribal governments and healthy tribal economic [*sic*] depend on strong and well-ordered tribal courts and judicial systems." S. Rep. No. 106-219, 1999 WL 1024201, at *4 (Nov. 8, 1999).

To better implement Congressional policy encouraging development of tribal courts, the BIA established the Tribal Justice Support program, which funds about 300 Indian courts.[5] Likewise, the Department of Justice adopted a program of assisting Indian tribes to enhance tribal justice systems, and has awarded upwards of $40 million to Indian tribes for this purpose.[6]

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tribal probate codes governing descent and distribution of trust lands); 25 U.S.C. § 3106(c) (federal and state courts must give full faith and credit to tribal judgments in forest trespass cases); 25 U.S.C. § 3713(c) (federal and state courts must give full faith and credit to tribal judgments in agricultural trespass cases); 28 U.S.C. § 1738B (states must give full faith and credit to child support orders of tribal courts).

5. *See* Letter from Chairman Byron L. Dorgan & Vice Chairman Lisa Murkowski, U.S. Sen. Comm. on Indian Affairs 13 (Feb. 22, 2008), *available at* www.indian.senate.gov/public/_files/FY2009viewsandestimatesltr.pdf.

6. *See* Tribal Judicial Inst. & Nat'l Judicial College, Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America 6 (William Brunson ed., 2005), *available at* www.law.und.edu/npilc/judicial/web_assets/pdf/ExecSum9-05.pdf.

These Legislative and Executive actions reflect the strong commitment of the United States to tribal self-governance, and specifically to the development of tribal judicial authority as an essential component of self-governance. Restrictions on tribal court jurisdiction that interfere with the ability of tribal governments to enforce their own laws would be flatly inconsistent with this clear federal policy.

## II. Consistent With Federal Policy, Tribal Courts Regularly Administer Civil Justice Fairly and Competently Over A Wide Range Of Cases.

Contrary to the assertions of Petitioner and its *amici,* tribal courts are neither unknown nor unknowable.[7] In keeping with the clear federal policies promoting tribal courts, tribal court systems are sophisticated partners with the federal and state judicial systems in administering civil justice. As Justice O'Connor aptly put it: "Today, in the United States, we have three types of sovereign entities – the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country." O'Connor, 33 Tulsa L.J. at 1.[8]

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7. *See, e.g.*, Petitioner Plains Commerce Bank's Brief at 40-44; Brief For *Amicus Curiae* American Bankers Association And South Dakota Bankers Association In Support Of Petitioner at 3.

8. Of the 562 federally recognized tribes in the United States, approximately 400 currently operate a formal tribal court system. *See generally* National Tribal Justice Resource Center, *Tribal*

### A. Tribal Court Systems Nationwide Are Understandable, Accessible, and Fair.

Like their state and federal counterparts, tribal courts adjudicate a wide range of cases, involving Indians and non-Indians alike. The cases run the gamut of civil litigation, including, for example, child welfare, domestic violence, torts, civil regulatory infractions, contract and commercial transactions, and enforcement of foreign judgments. *See* American Indian Law Ctr., Inc., Survey of Tribal Justice Systems and Courts of Indian Offenses 17 (2000). "The structure of tribal trial courts is often similar to state courts." Cohen's Handbook of Federal Indian Law § 4.04[3][c][iv][C] (Nell Jessup Newton ed., 2005 ed.). A survey published in 2000, required by the ITJA, 25 U.S.C. § 3612(a), reported that the vast majority of the participating tribes had formal justice systems similar to state or federal court systems, and virtually all provided for appellate review. *See* Survey, *supra*, at 22-23.

The law applied by tribal courts is written, knowable and publicly available. Written laws and court procedures, always available from the tribal courts themselves, are now available online for an ever-increasing number of tribes.[9] In addition, the

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*Court Directory*, www.tribalresourcecenter.org/tribalcourts/directory.

9. *See, e.g.*, Chickasaw Nation Code, *available at* www.chickasaw.net/site06/government/256_1578.htm; Colville Tribal Law & Order Code, *available at* codeamend.colvilletribes.com/index.htm;

public can access tribal codes, tribal-state agreements and other Indian law documents through the Native American Rights Fund's National Indian Law Library, which has an online searchable catalog.[10] Likewise, tribal court opinions are publicly available both in print and in increasing numbers on websites in easily searchable formats. In addition to tribal court reporters[11] and the monthly *Indian Law Reporter*, there are three comprehensive databases of tribal court opinions available through the National Tribal Justice Resource Center, the Tribal Court Clearinghouse and a commercial site, VersusLaw.[12] A selection of tribal court opinions is also available on LexisNexis and Westlaw.

Tribal court decisions apply principles that are familiar to any litigant in the United States.[13]

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Mashantucket Pequot Tribal Laws, *available at* www.mptnlaw.com; *see also* Sections II.B & II.C, *infra*.

10. *Available at* www.narf.org/nill/catalog/catalog.htm. In 2006, the National Indian Law Library was honored with the American Association of Law Library's Public Access to Government Information Award for their ground-breaking work in making tribal law available to the public.

11. *See, e.g.*, The Navajo Reporter; NICS Tribal Appellate Court Opinions; Mashantucket Pequot Tribal Court Reporter; Oklahoma Tribal Court Reports.

12. *See* www.tribalresourcecenter.org/legal/opfolder/default.asp; www.tribal-institute.org/lists/decision.htm; www.versuslaw.com.

13. Tribal court judges, through the National Tribal Court Law Clerk Program, have access to the research and writing services of law

In cases involving the ICRA, for instance, state and federal law is often applied by the tribal court judges in reaching their decisions.[14] Likewise, tribal court procedures are heavily influenced by and often closely mirror state and federal rules. *See* B.J. Jones, Role of Indian Tribal Courts in the Justice System 1 (Mar. 2000) (noting that, because many tribal courts evolved from courts originally established by the BIA, they "mirror the justice systems that exist in states and the federal system and use very similar procedures and rules.").[15]

Consistent with Justice O'Connor's observation about the important role that the federal, state, *and* tribal judiciaries play in the administration of justice in this country, federal and state judiciaries have entered into cooperative relationships with tribal courts to develop innovative approaches to judicial administration. For example,

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students and recent law graduates in a manner similar to state and federal court judges. *See* Massey Mayo Case & Jill E. Tompkins, A Guide for Tribal Court Law Clerks and Judges 74 (2007), *available at* www.triballawclerkships.org/files/guide.pdf.

14. In those instances where state and federal law is not applied, it is generally in cases involving only tribal members, such as domestic disputes, or in cases where the tribal court concludes that its interpretation of the ICRA is more protective of individual rights than would otherwise be available in parallel federal or state cases. *See* Matthew L.M. Fletcher, Tribal Courts, the Indian Civil Rights Act, and Customary Law: Preliminary Data, MSU Legal Studies Research Paper No. 06-05, at 6, 20-21 (Mar. 6, 2008), *available at* ssrn.com/abstract=1103474 (concluding that, based on study of cases from various tribal courts, tribal courts applied customary or traditional law exclusively in cases involving only tribal members).

15. *Available at* www.icctc.org/Tribal%20Courts-final.pdf.

the Conference of Chief Justices of the state court systems has worked to improve federal, state, and tribal court cooperation in resolving civil jurisdictional questions and to encourage cross-recognition of judgments among the three groups.[16] In the same vein, tribal judges study alongside state and federal judges, and receive the same high quality professional training as their counterparts, through the National Judicial College.[17]

Not surprisingly, therefore, tribal courts have been found to be fair and impartial forums for both Indian and non-Indian litigants. *See, e.g.*, Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047, 1094-97 (2005) (discussing results of several surveys related to fairness of tribal courts). Acknowledging the jurisdiction, fairness and competency of tribal courts, various state legislatures have enacted laws or adopted court rules that allow or require their courts to recognize tribal

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16. *See* Tribal-State Relations on the Tribal Court Clearinghouse, www.tribal-institute.org/lists/state_relations.htm; *see also* www.abanet.org/jd/tribalcourts/home.html (Judicial Division of the American Bar Association has established a Tribal Judicial Committee); Stanley G. Feldman & David L. Withey, Resolving State-Tribal Jurisdictional Dilemmas, 79 Judicature 154, 155-56 (1995) (Conference of Chief Justices has established a standing committee on federal, state and tribal relations); Teague Protocol, Dec. 7, 2001, *available at* www.walkingoncommonground.org/web-data/Components/resources/Teague%20Protocol.pdf (requires Wisconsin state courts and Four Chippewa Tribes of Wisconsin tribal courts to apply list of factors to determine which court is the more appropriate forum for a particular case).

17. *See* www.judges.org/ntjc.html.

court judgments.[18] Likewise, state courts have recognized the validity of tribal court judgments as a matter of full faith and credit or comity.[19]

While there are hundreds of tribal courts that could be used as examples, *amici* offer the Navajo Nation and NICS tribal court systems as just two representative illustrations that the tribal courts in this country are administering justice fairly and competently.

### B. The Navajo Nation's Well-Established Court System Is A Modern And Fully-Functioning Judiciary.

The Navajo Nation covers more than 27,000 largely intact and undivided square miles in New

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18. *See* Ariz. R. Proc. for Recognition of Tribal Ct. Civ. J. R. 5; Iowa Code Ann. ch. 626D; Mich. Ct. R. 2.615; Minn. R. Gen. Prac. 10; N.C. Gen. Stat. § 1E-1; Okla. Stat. tit. 12, § 728; Okla. R. for Dist. Cts. 30; S.C. Code Ann. § 27-16-80; S.D. Codified Laws § 1-1-25; Wash. Super. Ct. Civ. R. 82.5; Wis. Stat. Ann. § 806.245; Wyo. Stat. Ann. § 5-1-111; *see also* Colo. Rev. Stat. § 42-2-127; Ga. Code Ann. § 42-1-12(20)(B); Md. Code Ann. Crim. Pro. § 11-701; Wash. Rev. Code § 26.25.010.

19. *See, e.g., Tracy v. Superior Court*, 810 P.2d 1030 (Ariz. 1991); *Sheppard v. Sheppard*, 655 P.2d 895, 901–02 (Idaho 1982); *Mashantucket Pequot Gaming Enter. v. Malhorta*, 740 A.2d 703, 705-06 (N.J. Super. Ct. Law Div. 1999); *Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975); *Halwood v. Cowboy Auto Sales, Inc.*, 946 P.2d 1088, 1093 (N.M. Ct. App. 1997); *Matter of Marriage of Red Fox*, 542 P.2d 918, 920 (Or. Ct. App. 1975); *cf. In re Lynch's Estate*, 377 P.2d 199 (Ariz. 1962); *Begay v. Miller*, 222 P.2d 624 (Ariz. 1950); *Tempest Recovery Servs., Inc. v. Belone*, 74 P.3d 67 (N.M. 2003).

Mexico, Arizona, and Utah, an area larger than West Virginia and nine other states. Nearly all of the land is tribal or trust land, with a small percentage held in fee by non-Indians. *See* 2003 Navajo Nation Long Range Comprehensive Transportation Plan at II-1.[20] The Navajo Nation is traversed by nearly 10,000 miles of public roads, some of which are state and county highways, some BIA-maintained federal roads, and some Navajo-maintained roads. *Id.* at III-1. There are areas within the Navajo lands that are several hours by car from the nearest non-Navajo town. Much of the Navajo Nation (including the state highway system within it) is distant from, and not served in any way by, state law enforcement or civil authorities.

The Navajo tribe has over 250,000 members, a majority of whom live within the Navajo Nation, as do thousands of non-Indians. Many non-Indians work in or near the Navajo Nation for both Indian and non-Indian employers.[21] Many non-residents travel into the Navajo Nation to reach their places of employment, and millions visit the numerous tourist and recreational areas in Navajo territory. *See* 2005-2006 Comprehensive Economic Development Strategy of the Navajo Nation at 46 (in 2004, over 2.5 million tourists visited sites within the Navajo Nation).[22]

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20. *Available at* www.navajodot.org/cms/kunde/rts/navajodotorg/docs/223131733-08-22-2007-08-46-15.pdf.

21. *See* www.navajobusiness.com/fastFacts/majorEmployers.htm.

22. *Available at* www.navajobusiness.com/pdf/CEDS/CEDS%202005%20-%2006%20Final.pdf.

The Navajo Nation governs this vast territory through a legislature (the Navajo Nation Council), an executive branch, and the Navajo court system. The Navajo Nation courts are the most active tribal courts in the United States.[23] Today, these courts handle a caseload of over 30,000 cases a year, including civil, criminal, and family law cases. The Navajo civil docket includes a wide-ranging mix of cases, including tort, contract, and other commercial cases. *See* Judicial Branch of the Navajo Nation, Fiscal Year 2006 Statistical Report, District Court Civil Cases, Oct. 3, 2005 to Sept. 29, 2006. The Navajo Nation's courts, as a result, are experienced in handling the full panoply of cases that any court of general jurisdiction typically handles.

Many of these cases involve non-Indian parties. In fact, non-Indian plaintiffs frequently seek relief in the Navajo courts, but non-Indians are often defendants as well. Indeed, an independent, academic study of Navajo appellate court decisions between January 1969 and December 2004 (the "Navajo Court Study") found that almost 20% of the cases involved non-Indian litigants. Berger, 37 Ariz. St. L.J. at 1068, 1075. The cases involving non-Indians, like the Navajo court docket generally, cover a wide range of issues and claims, including contract, tort and other actions relating to commercial dealings.[24] There is no basis to believe

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23. *See* www.navajo.org/history.htm; www.navajocourts.org/history.htm.

24. *See, e.g., Curtis v. Amco Ins. Co.*, 8 Navajo Rptr. 838, 842 (Navajo D. Ct. 2005) (dismissing case against non-Indian defendant for lack of personal jurisdiction); *Agricredit Acceptance Co. v.*

that there is any unfairness toward or bias against non-Indians in the Navajo courts. The Navajo Court Study found that non-Navajo parties won in 47.4% of the cases decided between 1969 and December 2004. *Id.* at 1075. More importantly, the Navajo Court Study found that there was no greater chance that the Navajo courts would find in favor of a Navajo litigant in certain categories of cases considered to be "particularly vulnerable to bias," including decisions involving Navajo common law and cases arising from business relationships. *Id.* at 1094; *see also id.* at 1079-88.

"[T]he Navajo courts are structured very much like those in the state and federal courts." Tom Tso (former Chief Justice of the Navajo Supreme Court), *The Process of Decision Making in Tribal Courts*, 31 Ariz. L. Rev. 225, 227 (1989). Similar to the Anglo-American justice system, the Navajo Nation has a two-tiered court system composed of ten trial-level district courts and the Navajo Supreme Court.[25]

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*Henderson*, 7 Navajo Rptr. 529, 531 (Navajo D. Ct. 1997) (denying motion to set aside order of repossession and stipulated judgment in favor of non-Indian corporation); *Cummings v. Yazzie*, 7 Navajo Rptr. 479, 484 (Navajo D. Ct. 1994) (finding Navajo defendant liable for damages in negligence action brought by non-Indian for personal injury arising out of accident on U.S. highway on Navajo Reservation); *Boyd & McWilliams Energy Group, Inc. v. Tso*, 7 Navajo Rptr. 458, 464 (Navajo D. Ct. 1994) (granting preliminary injunction to non-Indian company to enjoin interference with drilling on land within Navajo reservation where company had permit and owned mineral rights).

25. *See* Courts of the Navajo Nation in the Navajo Nation Government: A Public Guide to the Courts of the Navajo Nation 2 (Oct. 2006), *available at* www.navajocourts.org/NNCourts.pdf. Each judicial district has a district court, a family court, and a

District court and appellate proceedings in the Navajo courts are governed by extensive written rules of procedure and evidence, which closely resemble the federal rules. *See* Yazzie Statement at 99.[26] Court proceedings are conducted in Navajo and English, and Navajo interpreters are provided. *Id.* The Navajo Supreme Court issues written opinions, as do the district courts in cases of first impression. *Id.* These decisions are written in English and are publicly available.[27]

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peacemaking division, which provides optional ADR services based in part on traditional Navajo principles and institutions. *Id.*; *see also Rulings Of The U.S. Supreme Court As They Affect The Powers And Authorities Of Indian Tribal Governments: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. 86, 96-98 (2002) (statement of the Honorable Robert Yazzie, Chief Justice of the Navajo Nation) [hereinafter Yazzie Statement]. Non-Indians may choose to resolve disputes in the Peacemaker Court but may not be compelled to do so. Paul E. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. Rev. 275, 312 (1991). Justice O'Connor has observed that the Navajo Peacemaker Court is an example of a court that "successfully blends beneficial aspects of both Anglo-American and Indian traditions." O'Connor, 33 Tulsa L.J. at 4. The Peacemaker Court model has been so successful, in fact, there is a movement to incorporate strengths of the tribal systems into the federal and state legal systems. *Id.* at 6. Information on the structure and administration of the Navajo courts is publicly available online at www.navajocourts.org.

26. *See also* www.navajocourts.org/index4.htm (district court rules of procedure and evidence); www.navajocourts.org/index3.htm (appellate rules of procedure).

27. Navajo Nation Supreme Court and selected district court opinions through 1999 can be found in the Navajo Nation Reporter. The decisions of the Supreme Court from 2000 to the present can be found on the Supreme Court website at www.navajocourts.org/suctopinions.htm. A new edition of the Navajo Nation Reporter

Generally, the governing law in the Navajo courts is Navajo law, which can be found in the published Navajo Code[28] and the written opinions of the Navajo courts. The Navajo courts look to state and federal law when an issue arises for which no Navajo law exists. *See id.*; *see also* Navajo Nation Code tit. 7, § 204; *Navajo Housing Auth. v. Bluffview Resident Mgmt. Corp.*, 8 Navajo Rptr. 891, 892 (Navajo D. Ct. 2006) (recognizing and applying New Mexico common tort law). Furthermore, Navajo courts look to federal cases to address issues of subject matter and personal jurisdiction. *See, e.g.*, *Sandoval v. Tinian, Inc.*, 5 Navajo Rptr. 215, 220 (Navajo D. Ct. 1986) (determining subject matter jurisdiction based on *Montana* test); *Thompson v. Wayne Lovelady's Frontier Ford*, 1 Navajo Rptr. 282, 288 (Navajo D. Ct. 1978) (looking to *International Shoe* and its line of cases in determining personal jurisdiction).

For litigants in the Navajo courts, the Navajo Nation Bill of Rights[29] provides additional protections beyond the due process, equal protection and other rights provided by the Indian Civil Rights

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containing decisions from the district court relating to Navajo common law since 1999 will be published shortly. Significant decisions also are available in the Indian Law Reporter and on www.versuslaw.com.

28. An annotated version of the Navajo Code can be found at www.ongd.navajo.org/files/nnca.pdf.

29. *Available at* www.navajocourts.org/RuleHarmonization/NavBillRights.htm

Act. In civil cases, the Navajo Rules of Civil Procedure set forth the procedure for making a jury demand, as well as the procedures for jury selection. Navajo R. Civ. P. 38, 41. Both Indians and non-Indians may serve on a jury. *See* Yazzie Statement at 101.

The justices and judges who serve in the Navajo courts are recommended by the Judiciary Committee of the Navajo Nation Council, appointed by the President of the Navajo Nation, and confirmed by the Navajo Nation Council. Navajo Nation Code tit. 7, § 355. Candidates must meet enumerated standards for appointment. *Id.* § 354. The Navajo Nation Code of Judicial Conduct, which is patterned after the ABA Model Code of Judicial Conduct, along with the Personnel Rules for Judges and Justices adopted in 2002, governs judicial conduct.[30] There is a formal, transparent system for handling complaints against judges, as well as an elaborate on-going judicial evaluation process.[31]

To practice before the Navajo courts, a lawyer must become a member of the Navajo Nation Bar Association ("NNBA"). Both Indians and non-Indians are eligible for membership in the NNBA, which currently includes attorneys licensed in Arizona, New Mexico, Utah, and Colorado.[32]

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30. These documents are available online at www.navajocourts.org/index8.htm.

31. Navajo Nation Code tit. 7, §§ 421, 422(A); Personnel R. for Judges and Justices X.A.3.

32. *See* www.navajolaw.org/about_us.htm.

The Navajo court system, organized very much like any other American court system, is a model judiciary with rules and protections similar, and in many cases identical, to those found in the state and federal courts. The fairness and competence of the Navajo courts has been frequently acknowledged. *See, e.g.*, *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506, 512 (D.N.M. 1994) ("The Navajo Nation has developed a sophisticated judicial system with highly competent jurists."); *see also Williams v. Lee*, 358 U.S. 217, 223 (1959) (recognizing competence of the Navajo Nation's courts to adjudicate disputes between Navajos and non-Indians). A review of the docket and decisions of the Navajo courts show that they are competent to handle the wide variety of cases before them and that they adjudicate those cases in a fair and unbiased manner regardless of a litigant's tribal membership.

### C. The Northwest Intertribal Court System Provides Sophisticated And Cost-Effective Judicial Services To Tribal Courts.

To be sure, some Indian tribes do not have the resources of large tribes like the Navajo Nation to develop and operate their courts. Tribes often join together to form intertribal court systems. These systems supplement individual tribal courts by, for example, providing *pro tem* trial judges or appellate justices on an as-needed basis. NICS is the oldest continually existing intertribal court system in the country, working with seven member tribes in

Western Washington, as well as other tribes on a contractual basis.

NICS offers full-time and contract trial and appellate judges, prosecutors, code-writers, appellate court staff, technology assistance, and training for court personnel. NICS judges and court staff travel throughout Western Washington State to the Indian reservations of the organization's member tribes. NICS also works closely with other Washington State Indian tribes to provide quality judicial support and court services.

NICS serves as a cost-effective way for tribes to deliver high-quality court services. Last year alone, the seven NICS member tribal courts heard over 2,400 civil and criminal cases, including appeals. In addition, NICS serves as a full-time court for one of its member tribes, the Tulalip Tribe of Washington. In this capacity, NICS provides Tulalip with two law-trained tribal court judges and a prosecutor, thereby enabling the tribal court to meet five days a week. Each of the other six member Indian tribes have an assigned chief judge and receive part-time services from NICS, such as the provision of tribal judges or prosecutors on an as-needed basis. NICS maintains a roster of judges – including lawyers in private practice, law professors, and tribal court judges from non-NICS member Indian tribes – to meet these needs. Appellate opinions issued by NICS-administered courts are

published in a reporter entitled NICS Tribal Appellate Court Opinions.[33]

All NICS member tribes have developed tribal codes that provide safeguards for all who appear before their tribal courts. The NICS member tribes' codes are publicly available – in some cases through the offices of the Court Clerk of the tribes and in some cases online and through various law school libraries.[34] Furthermore, these tribal codes generally include the rules applicable to litigants in the tribal courts. For example, the Tulalip Tribal Code includes, *inter alia*, the "Civil Rules of Tribal Court," which establish procedures for: the application of tribal, state, and federal law; service, summons, and pleading requirements; the jurisdiction of the tribal court; and trial application. *See* Tulalip Ordinance 49 (Law & Order Code); *see also* Skokomish Tribal Code Title 3 (Courts); Sauk-

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33. Currently, there are six volumes containing written appellate decisions from 1987 through 2004. Each volume provides an index of cases by tribe and subject matter and notations of orders in unreported cases. Volume VII, which will be published shortly, includes written appellate decisions issued during 2005 and 2006. Tribal court appellate opinions are available from NICS and from the law libraries at approximately thirty law schools in the Pacific Northwest and elsewhere in the United States where practitioners are likely to encounter Indian law issues.

34. *See, e.g.*, Tulalip Tribal Codes and Ordinances, *available at* www.tulaliptribes-nsn.gov/Home/Government/Departments/LegalReservationAttorney/OrdinancesCodes.aspx; Skokomish Tribal Codes and Ordinances, *available at* www.skokomish.org/SkokConstitution&Codes/Codes/Contents.htm; Sauk-Suiattle Tribal Codes and Ordinances, *available at* www.sauk-suiattle.com/legal.htm.

Suiattle Law & Order Code; Sauk-Suiattle Rules of the Court of Appeals.

* * *

It is evident that Indian tribal courts and the intertribal court systems that support them deliver fair and competent civil justice, and provide the means for member and nonmember litigants to understand the rules of practice and the applicable substantive law. The availability of tribal statutory and decisional law eliminates any perceived uncertainty of litigation in tribal court systems.

## III. Tribal Court Jurisdiction Over Non-Indians Arising Out Of Consensual Commercial Relationships In Indian Country Is Consistent With Congressional Policy And This Court's Precedents.

Despite the strong federal policies pointing the Court away from draconian limitations on tribal judicial authority, several *amici* argue that tribal court civil jurisdiction should extend only to cases in which non-Indians expressly consent to tribal court jurisdiction.[35] As demonstrated in Section I, *supra*, there is nothing in contemporary Congressional policy that even hints at such a drastic curtailment of the inherent sovereignty of Indian tribes to

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35. *See, e.g.*, Brief *Amicus Curiae* Of The States Of Idaho, Alaska, Florida, Oklahoma, North Dakota, South Dakota, Utah, Washington, And Wisconsin In Support Of Petitioner at 19-23; Brief *Amicus Curiae* Of Association Of American Railroads In Support Of Petitioner at 5-6, 24-27.

adjudicate matters affecting their citizens or their lands, or affecting those who do business with their citizens on their lands. And there is certainly nothing supporting the notion that Congress intended to limit tribal civil jurisdiction to situations in which non-Indians expressly consent to tribal court jurisdiction.

An express consent rule would require Indians to assert civil claims against non-Indians in state or federal court. Such a rule would necessarily signify disrespect for the competence and fairness of tribal courts and would undermine their status and authority in contravention of fundamental federal policy. *See Iowa Mut.*, 480 U.S. at 15 ("A federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts."); *see also* Berger, 37 Ariz. St. L.J. at 1052.

In addition, Petitioner and its *amici* fail to consider the practical implications of the "express consent" rule that they propose. A broad holding requiring express consent will result in unintended and adverse consequences. For instance, already overburdened federal and state courts could be overwhelmed if forced to take on the cases involving non-Indian defendants currently decided by tribal courts. *See, e.g.*, Clifford J. Wallace, *A New Era of Federal Tribal Court Cooperation*, 79 Judicature 150, 152 (1995) (noting that federal courts "could not absorb" the thousands of cases decided in the courts of the Navajo Nation given their "current resources"); S. Rep. No. 106-219, 1999 WL 1024201, at *18 ("The tribal courts are doing a huge business,

and we in the federal and state judiciary could not do without them." (quoting Hon. William C. Canby, Jr., *Tribal Courts, Viewed From A Federal Judge's Perspective*, The Tribal Court Record 16 (1996)). In addition, an express consent rule would lead, among other things, to inefficiencies and the waste of judicial and party resources. For example, where the dispute involves events that occurred on a reservation, with parties, witnesses, documents, and other evidence located on or near the reservation, and where state and federal courts may be far away, it follows that the tribal court is the most efficient and appropriate forum. *See, e.g., Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 665 N.W.2d 899, 918-19 (Wis. 2003) (Abrahamson, J., concurring) (concluding tribal court was proper forum for employment dispute even though concurrent state court jurisdiction existed where, among other things, nonmember defendant worked in tribe's casino). Inefficiencies also would result from Petitioner's proposal in cases involving non-Indian and Indian litigants who have counterclaims or cross-claims against each other. Because an Indian would be unable to bring a suit in tribal court against a non-Indian without express consent, and because the non-Indian would be able to pursue certain claims against Indians only in tribal courts, *see Williams*, 358 U.S. at 222-23, disputes arising out of the same set of facts would, in many instances, need to be litigated in two separate courts. In each of these instances, the limited resources of courts and litigants alike are better allocated if litigation can be pursued in the most suitable court.

Of even greater concern, an express consent rule may give rise to situations where an Indian has no adequate forum in which to seek relief at all. While state courts should generally give full force and effect to tribal laws, there is no guarantee that they will do so. This possibility, coupled with the unavailability of a tribal forum, could lead to nullification of tribal laws under some circumstances or could otherwise leave Indians without the ability to seek legal remedies afforded by those tribal laws. This problem would be exacerbated by the fact that in some cases, the non-Indian courts may be inaccessible as a practical matter. For example, as described in Section II.B, *supra*, portions of the Navajo Nation are quite distant from non-Navajo courts and often are not served by state law enforcement or civil authorities. Accordingly, Indians who transact business with non-Indians in the Navajo Nation may become involved in disputes that involve events and witnesses that are far from the nearest non-Navajo city, much less the nearest non-Navajo court.

The cries of alarm by Petitioner and its *amici* about purported inadequacies of tribal courts[36] wholly ignore the stated goals of Congress and have no basis in fact. As demonstrated in Section II, *supra*, tribal courts are not mysterious bodies governed by obscure customs, but are modern courts

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36. *See, e.g.*, Petitioner Plains Commerce Bank's Brief at 40-45; Brief For *Amicus Curiae* American Bankers Association And South Dakota Bankers Association In Support Of Petitioner at 3-6; Brief *Amicus Curiae* Of Association of American Railroads In Support Of Petitioner at 19-24.

much like the state and federal courts, and are governed by written rules and accessible statutory and decisional law. These tribal court systems serve a vital purpose not only for Indians, but also for those who engage in commerce with Indians in Indian country. And contrary to the position of Petitioner's *amici*, those who engage in commercial transactions with the Indians should be no more surprised to find themselves in tribal courts than a Floridian engaged in transactions with a New Yorker would be to find himself in a New York court. As this Court established in *Williams v. Lee*:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

358 U.S. at 223 (citations omitted); *cf. Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758-60 (1998) (deferring to Congress on issue of tribal immunity). In fact, far from expressing surprise at the possibility of tribal court jurisdiction, most non-Indian businesses routinely address it by including contractual provisions dealing with the manner and

forum of dispute resolution.[37] Thus, any purported benefits of the "express consent" rule that Petitioner and its *amici* support is far outweighed by the economic, social, regulatory, and judicial costs that would be exacted by such a rule.

As demonstrated in Section I, *supra*, respect for Indian tribal courts is inextricably tied to this Nation's policy recognizing tribal self-determination. *Amici* urge the Court, in considering the issue of tribal court civil jurisdiction in this and future cases, to give effect to the clear federal policy favoring the exercise of tribal judicial authority as an essential element of tribal autonomy and self-government.

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37. *See, e.g.*, Sisseton-Wahpeton Sioux Tribal Code § 70-02-01 (discussing tribal court jurisdiction in agreement with BNC National Bank) *available at* www.tribalresourcecenter.org/ccfolder/sisseton_wahpeton_codeoflaw70.htm; Steven Paul McSloy, *Lending in Indian Country*, *in* Asset Based Financing: A Transactional Guide § 4A.07 (H. Ruda ed., 2007); *see also* Brief For *Amicus Curiae* The National Congress Of American Indians § III.

## CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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Dated: March 19, 2008

# AMICUS CURIAE BRIEF

No. 07-411

IN THE

# Supreme Court of the United States

PLAINS COMMERCE BANK,

*Petitioner,*

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC., RONNIE LONG AND LILA LONG

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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Confederated Tribes of the Warm Spring Indian Reservation of Oregon

Duckwater Shoshone Tribe of the Duckwater Reservation of Nevada

Flandreau Santee Sioux Tribe

Fond du Lac Band of Chippewa

Hopi Indian Tribe

Minnesota Chippewa Tribe

Oglala Sioux Tribe

Omaha Tribe of Nebraska

Pueblo of Laguna

Rosebud Sioux Tribe

Saginaw Chippewa Indian Tribe of Michigan

Salt River Pima-Maricopa Indian Community

St. Croix Chippewa Indians of Wisconsin

Standing Rock Sioux Tribe

Winnebago Tribe of Nebraska

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## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages. NCAI and the *amici* tribes are dedicated to protecting the rights and improving the welfare of American Indians and tribes.

The decision in this case may have critically important implications for tribal self-government. This Court has long recognized that the tribes' inherent sovereign powers include tribal-court authority to exercise civil jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements," and over the "conduct of non-Indians on fee lands within [a] reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* v. *United States*, 450 U.S. 544, 565-66 (1981). The rule of law urged by the Plains Commerce Bank ("the Bank") would effectively nullify this longstanding recognition of tribal-court jurisdiction.

NCAI tribes have a strong interest in participating in this case because they are responsible for the administration of civil justice in Indian country,

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[1] No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

which they have long viewed as a critical attribute of tribal self-government and sovereignty. They oppose the abandonment of time-honored principles of Indian law and seek to prevent the further deterioration of tribal sovereignty that the Bank urges this Court to effect in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Bank seeks to void a judgment of the Cheyenne River Sioux Tribal Court of Appeals. That judgment upheld a jury verdict for Ronnie and Lila Long and the Long Family Land and Cattle Company (jointly, "the Longs"), on a number of claims against the Bank. The Bank, which has utilized the Cheyenne River courts with favorable results for many years, see generally *Amicus* Brief of Cheyenne River Sioux Tribe ("Tribe"), did not originally object to the tribal courts' jurisdiction, and continues to acknowledge the courts' jurisdiction over the Longs' breach-of-contract and bad-faith claims. The Bank now contends that the tribal courts lacked jurisdiction only over the Longs' claim that the Bank discriminated in contracting with them for the sale of their land in exchange for certain loans, and the right to repurchase that land, and in selling their land to nonmembers "'on terms more favorable'" than the Bank offered to the Longs. App. A-4.

NCAI agrees with the Longs that the Bank lacks standing to challenge the judgment on the Longs' discrimination claim and that, even if the Bank had standing, the judgment should be affirmed on other grounds. This brief, however, addresses the merits of the Bank's arguments in the event the Court decides to consider them. Specifically, the Bank claims that

the tribal courts lacked jurisdiction over the Longs' discrimination claim for three reasons:

(i) the cause of action involved reservation land owned by a nonmember, the Bank;

(ii) although tribes may "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements," *Montana*, 450 U.S. at 565, adjudication is not regulation; and, thus, tribes may not *adjudicate* causes of action that involve such relationships, and

(iii) the cause of action did not involve "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *id.* at 566.

In fact, however, this case involves a straightforward application of *Montana*'s delineation of tribal jurisdiction over nonmembers. As the record makes clear, the Longs and the Bank had a longstanding consensual, commercial relationship involving the Longs' ranch and its cattle operations on the reservation – a relationship made possible and directly affected by the Bureau of Indian Affairs' ("BIA's") regulations concerning loans to tribes and tribal members. The Bank's action against the Longs, and the Longs' discrimination counter-claim against the Bank, arose directly from these commercial dealings. Specifically, the Longs charged that the Bank offered them terms less favorable than those offered to nonmembers in connection with the transactions at issue. This relationship falls squarely within *Montana*'s terms. See Longs' Br. 39-44.

The Bank's first response – that the tribal courts lacked jurisdiction because the land at issue belongs to a nonmember – is based on mischaracterizations of

fact and a faulty analysis of the jurisdictional issue. The Bank's factual premise – that the Longs' ranch is nonmember land for purposes of this case – is wrong. And, in any event, the question presented is not whether the Tribe has jurisdiction over the Longs' ranch, but whether the Tribe has jurisdiction over a consensual, commercial relationship between the Longs (tribal members), their Company (a tribal entity, see *infra* at 22-23) and the Bank – a consensual relationship within which the Longs deeded their land located within the reservation to the Bank in exchange for additional loans and a lease with an option to purchase. App. A-10.

The Bank argues in the alternative that tribal courts lack jurisdiction under both tests set forth in *Montana*. The Bank asserts that the first test is not satisfied because it never entered into a consensual, commercial relationship with a tribe or tribal members. This argument is demonstrably wrong and was correctly decided against the Bank by both lower courts.

The Bank's principal argument is that the "consensual relationship" test does not apply to tribal courts' exercise of civil jurisdiction. The Bank contends that although tribes can enact laws and regulations governing such relationships, tribal courts cannot *adjudicate* claims arising from such relationships. This argument parses the language in *Montana* as if it were a statute, narrowly interpreting the word "regulate" to exclude adjudication. But that opinion is not a statute, see *Nevada* v. *Hicks*, 533 U.S. 353, 371-72 (2001); and there is no logic to the argument. Indeed, this Court has held, both generally and in the *Montana* context, that civil litigation regulates parties in the sense intended by *Montana*. And, in *Williams* v. *Lee*, 358 U.S. 217

(1959), a seminal case relied on by *Montana*, this Court made clear that tribal courts have exclusive jurisdiction over non-Indians' claims against tribal members based on consensual, commercial transactions in Indian country.

The Bank's reading of *Montana* would effectively eliminate tribal-court jurisdiction over nonmembers engaged in substantial commercial and domestic relationships with tribes and tribal members, contrary to this Court's precedent and in derogation of the tribes' ability to operate effective governments. The Bank, in other words, would have this Court undo both of the *Montana* tests in one fell swoop, despite the fact that neither this Court nor the political branches have suggested in the quarter century since *Montana* that its tests should be dismantled.

None of the Bank's policy arguments vitiates *Montana*'s application here. Based on this Court's 1959 decision in *Williams* and on *Montana*, non-Indians entering into consensual, commercial transactions and relationships have been on notice for almost half a century that tribal courts have jurisdiction over disputes arising out of such transactions and relationships. The traditional tools of negotiation of choice of law and choice of forum provisions provide nonmembers with flexibility in doing business with tribes and tribal members in Indian country, while preserving inherent tribal sovereignty. The Bank's attacks on tribal courts (made despite its use of the Tribe's courts) are grounded in innuendo, not fact, and run counter to both the strong congressional policy supporting tribal courts and the demonstrable efficacy and fairness of those courts in practice.

## ARGUMENT

### I. THE ORIGINS AND EVOLUTION OF INDIAN TRIBES' CIVIL JURISDICTION DEMONSTRATE THAT THE TRIBAL COURTS HAD JURISDICTION HERE.

A. The Constitution does not clearly delineate the relationship among Indian tribes, the federal government, and the States. It has thus fallen to Congress and this Court to define what powers inhere in the tribes' sovereign authority and what powers are lost or limited in view of the tribes' status as domestic, dependent nations within the United States. To understand the scope of tribal civil jurisdiction today, it is critical to understand the evolution of the tribes' historical and legal status.

Prior to conquest, the tribes possessed the powers of any sovereign state. See generally Felix S. Cohen, *Handbook of Federal Indian Law* ch. 1 (2005). And, during the colonial period, the tribes were recognized as sovereigns, retaining and exercising plenary police power over their own territories and members. See *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 544-45 (1832). However, under the so-called "discovery doctrine," as European powers spread across the continent, they were deemed to have gained the right to exclude other European powers from discovered lands and the exclusive right to purchase Indian lands. *Id.* at 543-44.

When the United States declared independence, the British Crown's discovery rights passed to the colonies and, ultimately, to the United States. After a period of great confusion and conflict between the colonies and the federal government over who possessed the authority to deal with the Indian nations under the Articles of Confederation, the

Constitution "grant[ed] Congress broad general powers to legislate in respect to Indian tribes, powers that [this Court] has consistently described as 'plenary and exclusive.'" *United States* v. *Lara*, 541 U.S. 193, 200 (2004).

Critically, the tribes retained sovereignty in their territory except to the extent specifically and expressly limited by Congress. See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). In the Constitution's text, the Indian Commerce Clause parallels the interstate and foreign Commerce Clauses in a grammatical sense. This parallel phrasing evinces the Framers' intention that the national government would have bilateral relations with the Indian tribes as distinct sovereign entities, as it would with foreign nations and the States. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 153 & n.19 (1982).

In addition, this Court's early jurisprudence made clear that treaty provisions and federal statutes limiting tribal powers and interests were to be construed narrowly to protect the tribes. See generally Cohen, *supra*, § 2.02. These rules of construction were adopted in light of the trust relationship between the tribes and the United States – a trust resulting from the tribes' simultaneous dependency and sovereignty. *Id.* § 2.02[2]. They retain their vitality today. See, *e.g.*, *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so"). The canons effect appropriate federal judicial deference to tribal authority and to Congress's ultimate responsibility over federal Indian policy. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 60 (1978) (in interpreting a federal statute that arguably displaces inherent tribal sovereignty, "a proper respect both for

tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").

In sum, this Court has long understood Congress to have plenary authority over Indian affairs, including the scope of tribal jurisdiction over nonmembers, see *Lara*, 541 U.S. at 205-07. But, the tribes' police powers are not "federal powers created by and springing from the [C]onstitution"; they are instead inherent sovereign powers that "existed prior to the [C]onstitution." *Talton* v. *Mayes*, 163 U.S. 376, 382, 384 (1896). Absent a clear treaty cession or contrary federal law, the tribes remain "distinct political communities" and retain sovereignty over their people and territory. See *Worcester*, 31 U.S. (6 Pet.) at 556-57, 561.

B. Under these principles, the tribes originally retained significant authority over non-Indians found in Indian country or engaged in relationships with tribal members. Since the Republic's early days, however, Congress has exercised its power to regulate Indian affairs. In some instances, its actions have altered the content of federal Indian policy with consequences that have dramatically affected the scope of tribal sovereignty over both land and nonmembers. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L.J. 1, 14-15 (1999).

The historical development that perhaps played the largest role in the evolution of tribal authority over nonmembers occurred in the late 19th century, when Congress "retreated from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive

homes for Indian tribes." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998). The General Allotment Act of 1887 (or "the Dawes Act") and related statutes allotted portions of reservation land over which the tribes had exercised dominion to individual Indians, with "surplus" land opened to non-Indian homesteading. *Id.* at 335-36. Before allotment, few non-Indians were present in "Indian country,"[2] and the question of tribal authority to regulate non-Indians and other nonmembers on reservations rarely arose.

In 1934, Congress "formally repudiated" the allotment policy by passing the Indian Reorganization Act, see *id.* at 339. That Act halted the vast losses of tribal land that occurred during the allotment era.

The profound damage to tribal interests caused by allotment was never undone. Massive lands within "Indian country," are now owned by non-Indians and other nonmembers. See L. Scott Gould, *The Congressional Response to* Duro v. Reina: *Compromising Sovereignty and the Constitution*, 28 U.C. Davis L. Rev. 53, 122-46 (1994). This fact has resulted in a substantial increase in tribal interaction with non-Indians and other nonmembers, raising significant questions about the scope of tribal jurisdiction over tribal and member relationships with nonmembers and nonmembers' conduct within the reservation.

C. In the modern post-allotment era, tribal civil jurisdiction over nonmembers may be based on express federal authorization or the tribes' inherent

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[2] "Indian country" is, *inter alia*, "all land within the limits of any Indian reservation under the jurisdiction of the United States government" and "dependent Indian communities" and "allotments." 18 U.S.C. § 1151 (1994).

authority. This Court has routinely approved tribal civil jurisdiction resulting from Congressional delegation. In *United States* v. *Mazurie*, 419 U.S. 544 (1975), this Court unanimously held that a federal criminal statute requiring all persons selling alcohol in Indian country to abide by state and tribal law was a lawful delegation of regulatory authority to the Tribe. Justice Rehnquist, speaking for the Court, explained that tribes are not "'private, voluntary organizations,'" but "unique aggregations possessing attributes of sovereignty over both their members and their territory." *Id.* at 557. And because tribes are government entities with their own "independent authority of the subject matter," Congress lawfully vested in the tribes "this portion of its own authority" to regulate Indian affairs. *Id.*

The scope of inherent tribal sovereignty over nonmembers has been the subject of evolution and sharper debate. The foundational precedent in this area is *Williams* v. *Lee*, 358 U.S. 217 (1959). There, the Court announced that Arizona's courts lacked jurisdiction over a non-Indian's claim against a Navajo seeking to collect for goods sold on the reservation. The Court held that permitting state-court jurisdiction over the non-Indian's claim "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223. As Justice Black explained:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has

> done so ever since. If this power is to be taken away from them it is for Congress to do it. [*Id.* (citation omitted).]

The Court thus ensured that suits by non-Indians against Indians concerning commercial relations in Indian country would fall within the exclusive jurisdiction of the tribal court, *i.e.*, that the dispute in *Williams* would be decided by tribal courts under tribal law. See *id.* at 222 (Navajo tribal courts are available to resolve "suits by outsiders against Indian defendants"). The Court's undergirding assumption was that tribal courts are a significant component of inherent tribal sovereignty – that "self-government includes having one's own courts apply one's own rules of decision to disputes arising within one's own territory." Frickey, *supra*, at 30. After *Williams*, well over a decade passed before the Court again addressed inherent tribal jurisdiction over nonmembers.

In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Tribe prosecuted in tribal court a non-Indian living on its reservation for assaulting a police officer. The federal government clearly had jurisdiction to prosecute this claim but declined to do so. The question presented was whether federal jurisdiction was exclusive or whether the Tribe had concurrent jurisdiction. This Court announced that evolving federal common-law rules determine whether and when tribal jurisdiction over nonmembers is "[]consistent with their status" as domestic, dependent nations. *Id.* at 208. Applying this standard, the Court held that tribal courts no longer had criminal jurisdiction over non-Indians, but acknowledged that Congress had authority to restore such jurisdiction to the tribes. *Id.* at 208-12.

In so holding, the Court relied in part on a "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians" for crimes. *Id.* at 206. Another critical factor was the United States' interest in protecting its citizens from "unwarranted intrusions on their personal liberty." *Id.* at 210. The Court posited that "[b]y submitting to the overriding sovereignty of the United States, Indian Tribes . . . necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* The Court was particularly concerned that the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302, does not accord all of the Bill of Rights' guarantees to criminal defendants in tribal courts. See 435 U.S. at 194 n.4 & 211.

That same concern caused this Court to reject tribal-court criminal jurisdiction over Indians who were not tribal members in *Duro* v. *Reina*, 495 U.S. 676 (1990). Expressly distinguishing *Williams* because it involved civil rather than criminal jurisdiction, *Duro* – like *Oliphant* – focused on the need for protection of citizens' personal liberty in a forum where the Constitution does not apply. See 495 U.S. at 687; *id.* at 705 (Brennan, J., dissenting). See *id.* at 688 ("[t]he exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties"). The Court thus concluded that the tribes' inherent sovereignty no longer included the right to exercise criminal jurisdiction over

nonmembers, including Indians, who committed crimes on the reservation. *Id.* at 693-94.[3]

Critically, this Court has not extended the *Oliphant* rule to tribal *civil* jurisdiction over nonmembers. In *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court rejected Washington's contention that federal law displaces the tribes' inherent authority to tax the activities or property of non-Indians. The Court explained that "[t]ribal powers are *not* implicitly divested by virtue of the tribes' dependent status." *Id.* at 153 (emphasis supplied). Instead, "[t]his Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." *Id.* at 153-54. With respect to taxation of non-Indians, the Court said:

> [A]uthority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934. [*Id.* at 153.]

See also *Morris* v. *Hitchcock*, 194 U.S. 384 (1904) (upholding tribal taxes on nonmembers grazing cattle on land they owned within tribal territory).

D. *Williams*, *Colville* and *Oliphant* formed the backdrop for the decision in *Montana* that governs this case. In *Montana*, the Tribe had outlawed

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[3] Congress subsequently overrode in part the common-law rule announced in *Duro*, restoring the tribes' inherent sovereign power to exercise criminal jurisdiction over nonmember Indians who commit certain crimes on reservations. In *Lara*, 541 U.S. at 205-07, this Court confirmed Congress's authority to do so.

hunting and fishing by nonmembers including on the lands within the reservation owned in fee by nonmembers. The Court ultimately upheld the Tribe's civil jurisdiction over nonmembers hunting and fishing on tribal lands, but concluded that the Tribe lacked such authority over nonmembers on "lands no longer owned by the tribe." 450 U.S. at 564-65.

In doing so, this Court did not transport *Oliphant*'s ban on tribal-court jurisdiction over nonmembers wholesale into the civil context. Rather, it recognized two significant circumstances – critical to the effective functioning of tribal governments and their courts – in which the exercise of such jurisdiction is appropriate:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [*Id.* at 565-66 (citations omitted).]

This Court cited four cases to illustrate the scope of *Montana*'s first test. All involved nonmembers who engaged in voluntary commercial transactions with the tribes or tribal members, thereby submitting themselves to tribal jurisdiction. See *Hicks*, 533 U.S. at 371-72. *Confederated Tribes*, 447 U.S. at 152-53,

involved nonmembers' purchases of cigarettes from a tribal outlet. *Morris*, 194 U.S. at 384, authorized tribal regulation of ranchers grazing animals on Indian lands "under contracts with individual members of said tribe." *Williams*, as set forth *supra*, declared that tribal courts had "exclusive" jurisdiction over a "lawsuit arising out of on-reservation sales transaction[s] between [a] nonmember plaintiff and member defendants." *Strate* v. *A-1 Contractors, Inc.*, 520 U.S. 438, 457 (1997) (citing *Williams*, 358 U.S. at 223). Finally, *Buster* v. *Wright*, 135 F. 947, 949 (8th Cir. 1905), rejected a jurisdictional challenge to a tribe's "permit tax" imposed upon nonmembers for "the privilege . . . of trading within [reservation] borders."

These cases provide significant "guidance . . . as to the type of consensual relationship contemplated by the first exception of *Montana*." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 653 n.4 (2001); see also *Strate*, 520 U.S. at 457. They demonstrate that *Montana*'s first test (i) covers "private commercial actors" who "voluntarily submit[] themselves to tribal regulatory jurisdiction by the arrangements that they . . . enter[] into," *Hicks*, 533 U.S. at 372; (ii) treats as "'inherent'" the tribes' "'authority . . . to prescribe the terms upon which noncitizens may transact business within its borders,'" *Strate*, 520 U.S. at 457 (omission in original) (quoting *Buster*, 135 F. at 950); (iii) addresses the scope of tribal-court jurisdiction, *id.* (describing *Williams*' declaration of exclusive tribal-adjudicatory jurisdiction over nonmember merchant's suit against tribal members); and (iv) does not require the express consent of non-Indians before tribes may exercise civil jurisdiction over them. These principles require affirmance in this case.

E. Since *Montana* was decided, this Court has addressed the application of its first test in various circumstances. Three themes have emerged.

First, as already made clear, this Court has consistently reaffirmed that under *Montana*'s first test, tribes have civil jurisdiction over nonmembers who are "private commercial actors" and who "voluntarily submit[] themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." *Hicks*, 533 U.S. at 372. See also *Atkinson*, 532 U.S. at 653 (same); *Strate*, 520 U.S. at 457 (same). In each of these decisions, the Court has cited and relied on *Williams* as an exemplar of the first *Montana* test, describing it as "declaring tribal jurisdiction exclusive over [a] lawsuit" by a nonmember bringing a civil claim arising out of a commercial transaction against a tribal member. See, *e.g.*, *Strate*, 520 U.S. at 457. In this context, the Bank's arguments – that its consensual dealings with the Longs did not give rise to tribal-court jurisdiction and that the first *Montana* test does not reach adjudication – are plainly wrong.

Indeed, since *Montana*, this Court has upheld various exercises of the tribes' inherent authority over the conduct of nonmember defendants on the reservation and in consensual, voluntary relationships with tribes and tribal members. See, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983) (upholding tribal regulation of nonmembers hunting and fishing on reservation); *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195, 200-01 (1985) (upholding tribal severance tax on minerals extracted from reservation by non-Indian); cf. *Merrion*, 455 U.S. at 142 ("a tribe has no authority over a nonmember *until the nonmember enters tribal*

*lands or conducts business with the tribe*") (emphasis supplied).

Second, this Court has *refused* to bar tribal courts from hearing civil cases against non-Indians, as it did with criminal cases against non-Indians in *Oliphant*. In fact, the Court's holding that a nonmember contesting tribal-court civil jurisdiction must first exhaust that claim in tribal court, see *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 855-56 (1985), would make no sense if tribal courts *always* lack jurisdiction over civil cases involving nonmembers.

As this Court expressly said in *National Farmers*, "the reasoning of *Oliphant* does not apply to this case." *Id.* at 854. See *id.* at 855 ("the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed"). The Court explained that

> the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. [*Id.* at 855-56 (footnote omitted).]

The Court mandated that tribal courts resolve the question of their own jurisdiction "in the first instance," in part because "Congress is committed to a policy of supporting tribal self-government and self-determination." *Id.* at 856. This reasoning makes clear both that tribal courts possess civil jurisdiction in cases involving nonmembers, and that this type of

civil jurisdiction is an important aspect of tribal sovereignty. See also *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987) ("[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty") (citing *Montana*; *Colville Indian Reservation*, *inter alia*).

Finally, this Court has made clear that in applying the first *Montana* test, the nexus between the nonmember and the tribe, tribal members or tribal lands is significant. As the Court explained in *Hicks*, when nonmembers enter into "'private consensual' relationships" "'with the tribe or its members, through commercial dealing, contracts, leases or other arrangements,'" that arrangement provides a sufficient nexus for tribal civil jurisdiction. See 533 U.S. at 371. See also *Strate*, 520 U.S. at 457 (elaborating on the nexus required by "*Montana*'s list of cases fitting within the first exception"). In addition, tribal power to tax and otherwise regulate "non-Indians entering the reservation to engage in economic activity" has routinely been upheld. See *Confederated Tribes*, 447 U.S. at 153 (citing *Buster* v. *Wright*, *inter alia*). See *id.* at 152 ("[t]he power to tax transactions occurring on trust lands and *significantly involving a tribe or its members* is a fundamental attribute of sovereignty").[4] As explained

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[4] The nexus between tribal-land regulation and reservation-land ownership has played a significant, but not dispositive role in this Court's analysis of tribal jurisdiction over nonmembers using that land. *See Hicks*, 533 U.S. at 360 ("[t]he ownership status of land, in other words, is only one factor to consider in determining" tribal civil jurisdiction, albeit it is sometimes "dispositive"). *See Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 438-44 (1989) (Stevens, J., joined by O'Connor, J., announcing the judgment) (the tribe had authority to zone nonmember land in the area of

below, these recent iterations of *Montana* and the jurisdictional nexus it contemplates among tribes, their members and nonmembers plainly embrace the relationship between the Longs, their ranch, and the Bank.

This Court's post-*Montana* decisions, in sum, contain no hint that *Montana*'s tests should be narrowed as the Bank argues here. Nor has Congress taken action suggesting that those tests should be truncated or eliminated altogether. To the contrary, as elaborated upon in the *Amicus* Brief of the National American Indian Court Judges Association et al., Congress and the executive branch have expressed strong support in the years following *Montana* for tribal self-government and the tribal courts in particular. If *Montana* was grounded in the common presumptions of the political branches and this Court, then the developments since *Montana* strongly counsel against eviscerating the *Montana* tests. And, as the next section demonstrates, any fair application of those tests supports the exercise of jurisdiction by the Tribe's courts in this case.

Deference to Congress, recognition of tribal self-government and the balancing of tribal and federal interests are the doctrinal underpinnings of *Montana*. The Bank's proposal – that tribes lack civil jurisdiction over nonmembers absent express consent – is divorced from the history and precedent that led to *Montana*, inconsistent with the context-specific analysis mandated by the array of relevant considerations, and disrespectful of the tribes' governmental status.

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the reservation that was largely Indian trust land, but lacked authority to do so in areas largely owned by nonmembers).

## II. NONE OF THE BANK'S ARGUMENTS CASTS DOUBT ON THE EXERCISE OF TRIBAL-COURT JURISDICTION HERE UNDER *MONTANA*.

### A. This Civil Dispute Is Not About And Does Not Arise On Non-Indian Land.

The Bank first argues that the *Montana* tests have no application here because this case involves reservation land that was owned by a nonmember, the Bank. As the Longs have demonstrated, this argument misapprehends the issue presented – whether the tribal courts had civil jurisdiction to decide the claim that the Bank engaged in discrimination in the course of its consensual, commercial dealings with the Longs.

Thus, this case is not, as the Bank would have it, akin to a claim arising out of a tort physically occurring on land held or controlled by a non-Indian or by the federal or state government (*e.g.*, *Strate*) or to a tribal assertion of civil jurisdiction over transactions among nonmembers occurring on such land (*e.g.*, *Atkinson*). Instead, this is a dispute between tribal members (the Longs) and a nonmember (the Bank) concerning a transaction that was an integral part of a longstanding commercial relationship between these parties in which the BIA was involved. This claim thus falls squarely within the ambit of tribal civil jurisdiction over nonmembers described in *Montana*, 450 U.S. at 565-66.

NCAI will not repeat the detailed demonstration of this point by the Longs. Instead, NCAI will focus on how the nature of the transaction here *heightens* the tribal interest in civil jurisdiction.

First, the transaction underlying the discrimination claim involves the loss of tribal members' ownership

of land within Indian country. Both as a historical matter and as a factor relevant to tribal sovereignty, this circumstance makes plain the nexus between the transaction and tribal interests and self-government. It is no exaggeration to say that the post-settlement history of the tribes is a history centered on the loss of sovereignty and land. Conquest (resulting in treaties of cession) and allotment, described *supra*, caused the most substantial losses. Indeed, "[l]and speculators and frontier settlers saw allotment as a sure-fire scheme to open up Indian lands for more productive use and ultimate transfer to non-Indian owners." Cohen, *supra*, § 1.04, at 77. In 1887, when the Dawes Act was passed, the tribes held 138 million acres; less than fifty years later, when allotment ended, only 48 million acres remained. *Id.* at 77-78.

Since the end of the allotment and assimilation eras, the federal government's policy has been to protect and foster tribal sovereignty and lands, with substantial federal statutory and regulatory schemes addressing these subjects. See, *e.g.*, *Amicus* Brief of the National American Indian Court Judges Association, et al. But, the critical point here is that the transaction that is the basis of the Longs' discrimination claim is one in which Indian history and tribal sovereignty are uniquely implicated because it involves the loss of tribal members' land within Indian country.

Second, the role of the federal government, acting in furtherance of its trust obligation to the tribes in connection with this transaction, supports the tribal courts' civil jurisdiction over this dispute. The Indian Financing Act, 25 U.S.C. § 1451 *et seq.*, authorizes a number of BIA programs to promote development in Indian country, including the Indian Guaranteed Loan Program, which provides a guaranty or

insurance coverage up to and including 90 percent of a loan to a tribe, tribal business or business entities with at least 51% Indian ownership for projects that will contribute to the tribal economy. See 25 C.F.R. § 103.6. The loans must be those that would not be made without the program. *Id.* § 103.4(d). The Banks' loans to the Longs, accordingly, would not have been made – and thus the transaction that is the subject of the tribal courts' civil jurisdiction would not have occurred – but for the Longs' tribal status and their ranch's contribution to the tribal economy. This nexus between the transaction and tribal interests militates strongly in favor of tribal-court jurisdiction.

### B. Tribal Courts Had Jurisdiction Under *Montana*.

#### 1. This Case Involves A Straightforward Application of *Montana*'s First Test.

For two reasons, the Bank contends that this case does not fall within the first *Montana* test for tribal jurisdiction over nonmembers.

First, the Bank wrongly contends that the Long Company is not a tribal entity. The discrimination claim at issue was brought by the Longs, who are indisputably tribal members; and they, as well as the Company, formed a commercial relationship with the Bank, even guaranteeing the Company's debt. App. A-10 to A-12.[5] Two federal courts have concluded that the Long Company is a tribal entity for purposes of this case (*id.* at A-5, A-7), a factual finding entitled

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[5] The Bank's statement that the Longs used the Company to "shield [themselves] from personal liability," Bank Br. 34, is thus highly ironic.

to deference under this Court's two-court rule. See *Berenyi* v. *District Dir.*, 385 U.S. 630, 635-36 (1967) (the Court generally will not "'undertake to review concurrent findings of fact by two courts below'").

If more were needed, the transaction was based on and occurred as a result of BIA loan guarantees and insurance that were available because tribal members own more than 50% of the Company. See *supra*, at 21-22. The Bank's suggestion that it has not "availed itself of the advantages of doing business with a member," Bank Br. 33, is belied by these facts.

Second, the Bank seeks to avoid the application of the first *Montana* test by arguing that it describes only the scope of tribal "regulatory" jurisdiction over nonmembers, *id.* at 31, which is broader than tribal adjudicatory jurisdiction over nonmembers. This argument cannot withstand scrutiny.

Initially, as noted *supra*, this Court cited examples of circumstances in which tribal courts satisfied this test for tribal jurisdiction in *Montana*. See 450 U.S. at 565-66. Among these examples was *Williams*, 358 U.S. at 223, a case involving not regulatory but adjudicatory jurisdiction. And, in *National Farmers Union*, a case involving adjudicatory jurisdiction, the Court noted that if it were to extend *Oliphant* to the civil setting, it would have to forbid tribal courts from ever exercising civil jurisdiction over nonmembers, and this it declined to do. See 471 U.S. at 855-56. Finally, in *Strate*, this Court characterized *Williams* as "*declaring tribal jurisdiction exclusive over* [*a*] *lawsuit arising out of on-reservation sales transaction between* [*a*] *nonmember plaintiff and member defendants.*" 520 U.S. at 457. None of this is consistent with the Bank's assertion that tribal courts lack jurisdiction over nonmembers under *Montana*'s first test.

Second, this Court has said that "[a]s to nonmembers, . . . a tribe's adjudicative jurisdiction does not *exceed* its legislative jurisdiction," *id.* at 453 (emphasis supplied); but, surely, it does not fall short of that subject matter either. See Cohen, *supra*, § 7.01, at 598 n.12 ("[W]ith respect to a tribal court's subject matter jurisdiction . . . it makes sense to view that power as reaching as far as the tribe's legislative jurisdiction. *Both legislative jurisdiction and subject matter jurisdiction are concerned with whether the subject involved is properly within the authority of the government in question.*") (emphasis supplied).

The argument that the tribe has civil-regulatory but not civil-adjudicative jurisdiction makes neither logical nor practical sense. As a matter of practice, if a tribe has civil-regulatory jurisdiction over the Bank, as the Bank concedes, that jurisdiction could be exercised either by an executive officer, with judicial review available, or through litigation in court brought by the executive officer. Neither the federal nor the state courts, however, have jurisdiction to enforce or review tribal law. The only logical forum for litigation concerning tribal regulation is a tribal court. If a sufficient nexus exists to warrant tribal jurisdiction in the first instance, then tribal-adjudicative jurisdiction must follow.

Thus, for example, if a nonmember is caught hunting on tribal land in violation of tribal civil law, the tribal game warden may seize the rifle as a civil forfeiture. Absent diversity jurisdiction (which is not available when a tribe is a party), the nonmember could not litigate this forfeiture in federal or state court (*Williams*, 358 U.S. at 222-23). (If a federal court were to have diversity jurisdiction, the matter would have to be stayed for exhaustion of tribal remedies, see *LaPlante*, 480 U.S. at 16.) The only

place he could seek judicial relief to get his rifle back would be the tribal court (or some administrative appeals process within the tribal executive branch, presumably subject to judicial review). In the same vein, where a tribe issues a comprehensive regulatory regime governing consensual, commercial dealings between nonmembers and the tribe (or its members), the enforcement of that regime would be a toothless affair without the availability of the tribal court system. As a practical matter, without adjudicative jurisdiction, regulatory jurisdiction is largely meaningless.

Nor is there any basis in logic for the Bank's view that the first *Montana* test applies exclusively to "regulatory" jurisdiction, and that regulatory jurisdiction somehow excludes adjudicatory jurisdiction. "[C]ommon law rules administered by judges, like statutes and regulations, create and define legal obligations." *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1012 (2008) (Stevens, J., concurring). Indeed, "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 522, 504 (1992) (emphasis omitted) (plurality opinion). In other words, far from being "world[s] apart," Bank Br. 36, statutes and regulations, and the judicial enforcement of statutes, regulations and common law, all regulate. See also App. A-14 ("[t]ort law is [simply another] means of regulating conduct") (citing W. Page Keeton et al., *Prosser and Keeton on Torts* 25 (5th ed. 1984)).

This Court has clearly held that a state court's entry of judgment on a state statutory or common-law cause of action imposes state-law requirements on the litigants. See, *e.g.*, *Riegel*, 128 S. Ct. at 1008 (common-law causes of action impose requirements

on entities and thus are preempted when inconsistent with federal statutes). That adjudicatory jurisdiction regulates litigants is clearest when the adjudication enforces a statute or regulation. But, common-law liability is also "'premised on the existence of a legal duty,' and a tort judgment therefore establishes that the defendant has violated a state-law obligation." *Id.* (quoting *Cipollone*, 505 U.S. at 522). "And, while the common law remedy is limited to damages, a liability award can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.* (internal quotation marks omitted) (quoting *Cipollone*, 505 U.S. at 521).

In essence, the Bank's argument is that *Montana* should be treated like a statute subject to a strict construction, and that the word "regulate" should be given its narrowest conceivable interpretation and exclude adjudications that regulate. But this Court does not "parse the text" of its opinions as though they are "governing statute[s]." *Commissioner* v. *Bollinger*, 485 U.S. 340, 349 (1988). See *Hicks*, 533 U.S. at 371-72 (declining to treat *Montana* as a statute). The word "regulate" should be given its natural meaning – and the meaning clearly intended by *Montana* – as embracing all forms in which the government undertakes to establish and enforce the legal rules governing behavior.[6]

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[6] The Bank's attempt to use the Indian Commerce Clause to support its argument that "regulate" means only to enact laws and regulations is far off the mark. Bank Br. 38. The Constitution refers solely to Congress, while *Montana* addresses tribal government as a whole. Moreover, in exercising its authority over the tribes, Congress can establish tribal courts or designate courts to adjudicate claims. Thus, Congress's regulatory power includes the power to provide for adjudication.

### 2. *Montana*'s Second Test Also Supports Tribal Court Jurisdiction.

The Bank also urges this Court to reach a question not addressed by the courts below and to hold that *Montana*'s second test does not apply. NCAI endorses the Longs' showing that the Bank's conduct threatens tribal integrity, economic security and welfare. Longs' Br. 53-57. *Amici* will not repeat that analysis, but urges the Court to focus on one important aspect of this test.

In *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court declared that "[t]he government of the United States has been emphatically termed a government of laws, and not of men." *Id.* at 163. Our government warrants this "high appellation" in substantial part due to its federal and state court systems. Although many tribal courts were initially established as part of the federal assimilation of tribes into the American mainstream, see generally William T. Hagan, *Indian Police and Judges: Experiments in Acculturation and Control* (1966), tribal judicial systems are now an important component of tribal "government[s] of laws" for many tribes; and those systems generally receive the political and financial support of the United States. The *Amicus* Brief of the National American Indian Court Judges Association, et al., makes this showing in detail.

Tribal legal systems with civil jurisdiction over nonmembers engaged in substantial, consensual, transactions and relationships with tribes and tribal members are crucial to tribal self-government. Tribal legal systems have limited practical utility if they cannot resolve such disputes. Tribes cannot foster tribal economic and social policies, and they cannot act as true governments if they lack civil jurisdiction

to implement and enforce their laws in the context of such relationships. See generally Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047, 1105-06 (2005). It is no exaggeration to say that without tribal-court civil jurisdiction over non-Indians engaged in relationships or transactions that give them a nexus to the tribe and tribal lands, there will be little respect either for tribal courts or tribal self-government. *Id.* at 1109-10. See also *Hearing on Concerns of Recent Decisions of the U.S. Supreme Court and the Future of Indian Tribal Governments in America Before the S. Comm. on Indian Affairs*, 107th Cong. 29 n.4 (2002) ("[restriction of tribal court jurisdiction over non-Indians] creates resentment and projects an image that non-Indians are above the law in the area where they chose to reside or enter into.") (testimony of John St. Clair, Chief Judge of the Shoshone and Arapahoe Tribal Court of the Wind River Reservation), *quoted in* Berger, *supra*, at 1114. *Montana* certainly recognizes this point by citing *Williams* as an illustration of test two, as well as test one.

## III. NOTHING IN THE REALITY OF TRIBAL COURTS OR TRANSACTIONS AMONG TRIBES, TRIBAL MEMBERS AND NON-INDIANS REQUIRES THIS COURT TO FORBID TRIBAL-COURT JURISDICTION.

*Montana* authorizes but does not make exclusive tribal-court jurisdiction over consensual relations between tribes, tribal members and nonmembers with a sufficient nexus to Indian country. After *Williams* and *Montana*, the general assumption of non-Indians doing business with tribes and tribal members in Indian country has been that tribal courts enjoy jurisdiction over civil disputes arising

out of those relationships and transactions. That assumption arises from *Williams* and was confirmed by *Montana*. The Bank clearly shared that assumption, litigating in tribal court on many previous occasions and objecting to tribal-court jurisdiction only when it lost below. See generally *Amicus* Brief of Cheyenne River Sioux Tribe.

Under the *Montana* regime, parties have successfully negotiated hundreds of thousands of agreements and contracts that are essential to economic development in Indian country, but also allow tribal governments to protect important tribal interests. The Bank nonetheless argues that allowing the tribal courts to exercise jurisdiction over the claims at issue is bad public policy because tribal courts are underfunded; because the Constitution does not apply and non-Indians lack notice of the substance of Indian law; and because transactions among tribes, tribal members and non-Indians do not implicate tribal self-government.

First, as discussed above, there is no reason to believe that the political branches view the *Montana* tests as bad policy such that this Court, acting in its common-lawmaking capacity, should narrow or eliminate those tests. To the contrary, as the *Amicus* Brief of the National American Indian Court Judges Association et al. demonstrates, Congress has shown considerable support for tribal courts in *Montana*'s wake, affirming *Montana*'s delineation of civil jurisdiction in a variety of realms.

Second, the impact that affirmation of the tribal courts' jurisdiction would have on the Bank and similarly-situated businesses is vastly exaggerated. In any loan agreement or contract involving tribes, tribal members and nonmembers, the parties may enter into agreements determining both the choice of

forum and the choice of law governing that dispute. Such clauses are common in almost every form contract and certainly in contracts negotiated between commercial parties at arm's-length.

In any event, thousands of contract relationships and other transactions take place in Indian country based on the premise that tribal courts will have jurisdiction unless the parties agree otherwise. Often, these contracts and loan agreements address choice of law and forum issues. The *Montana* framework allows parties engaged in consensual, commercial transactions the freedom to negotiate the choice of law and forum issues that best suit their individual requirements. Tribes and tribal members can decide when and the extent to which important tribal interests are implicated by a transaction, while businesses can decide whether questions of choice of law and forum must be resolved in a particular way as a condition of entering into the transaction. In this setting, and in light of the consensual nature of the transactions at issue, there is no justification for working the deep infringement of tribal sovereignty and self-government urged by the Bank.

These kinds of negotiating options were certainly open to the Bank, which had been dealing with the Longs specifically and within Indian country generally for many years under the *Williams/ Montana* regime. Indeed, the Bank clearly believed that its interests were best served by the tribal-court forum in this case and in numerous others until it failed to prevail here.

The Bank's further arguments and assumptions about the inadequacy of tribal courts as compared with state and federal courts are demonstrably incorrect and designed to engender prejudice against the former. The Bank would be hard pressed to

explain in any serious way why it did not receive thorough and fair process below. As the Tribe's *amicus* brief carefully details, the Tribe operates a modern, serious court system that administers justice in an even-handed fashion. See generally *Amicus* Brief of Cheyenne Sioux River Tribe. This is also true of the Tribe's sister courts around the Nation. See generally *Amicus* Brief of the National American Indian Court Judges Association, et al. The fairness and efficacy of the Tribe's courts no doubt explain the Bank's repeated utilization of those courts over the course of many years, as well as the fact that the Bank has never objected to their jurisdiction until now. The Bank's efforts to undo the *Montana* tests by casting unfounded aspersions on the Tribe's courts find no support in Congressional policy and should not be sanctioned by this Court.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 19, 2002

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# AMICUS CURIAE BRIEF

No. 07-411

# In the Supreme Court of the United States

PLAINS COMMERCE BANK
*Petitioner,*

v.

LONG FAMILY LAND & CATTLE CO., INC., *ET AL.*
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF OF *AMICI CURIAE* THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE, SACRED CIRCLE, NATIONAL RESOURCE CENTER TO END VIOLENCE AGAINST NATIVE WOMEN, *ET AL.* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are national and regional organizations committed to ending domestic violence, sexual assault, dating violence, and stalking against women, including American Indian women within tribal jurisdictions. *Amici* have worked collectively to enhance the civil and criminal justice systems' response to these crimes and civil wrongs for the last three decades.

*Amici* write to deepen the Court's understanding of the national crisis of domestic violence committed by non-Indians against Indian women and to urge the Court to ensure that its decision in this case does nothing to undermine tribal courts' civil jurisdiction over such perpetrators of domestic violence. In particular, accepting petitioner's invitation to adopt a broad ruling limiting tribal court civil jurisdiction over non-Indians only to those "expressly consenting" to such jurisdiction could severely undermine *amici's* interests. Under current law, civil protection orders issued by tribal courts, like those of state courts, are enforceable by any state or tribe under the full faith and credit provisions of the Violence Against Women Act. *Amici* urge this Court to craft its decision in this case with an eye to preserving that authority, which is all too often literally a matter of life and death.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. A complete list of organizations participating as *amici curiae* appears in the appendix.

## SUMMARY OF ARGUMENT

Every hour of every day an American Indian woman within the authority of a tribal court is the victim of sexual and physical abuse. The victimization is often devastating to the woman's future quality of life. Violence against American Indian women occurs at greater rates than any other population of women in the United States. Non-Indian perpetrators commit a disproportionate number, eighty-eight percent, of such violent victimizations and nearly 4 of 5 American Indian victims of sexual assault described their offender as white.

Congress responded to this crisis with the passage of the Full Faith and Credit (FFC) provision of the Violence Against Women Act (VAWA) in 1994, which unambiguously recognized Indian tribes' civil jurisdiction to issue protection orders in cases of domestic violence, dating violence, sexual assault, and stalking. VAWA's full faith and credit provision relied upon the inherent authority of Indian tribes and clarified that tribal courts had the authority to issue civil protection orders. In the Violence Against Women Act of 2005, Congress enhanced Indian tribes' ability to protect women. Specifically, Title IX of VAWA 2005 was intended "to strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes committed against Indian women."

In this case, petitioner advances an unjustifiably restrictive reading of *Montana* v. *United States* that could undermine the tribal court authority recognized by these Acts of Congress. Respondent and other *amici* amply demonstrate the fundamental

flaws with petitioner's arguments on the facts before this Court, and we do not repeat those arguments here. As further set forth below, however, *amici* do wish to emphasize that accepting petitioner's unjustifiably narrow construction of the tribal court authority recognized in *Montana* would have particularly troubling implications in the context of domestic violence.

## ARGUMENT

### I. DOMESTIC VIOLENCE COMMITTED BY NON-INDIANS AGAINST INDIAN WOMEN IS A NATIONAL CRISIS.

In 2005 the United States Congress reauthorized the Violence Against Women Act (VAWA)[2] with the inclusion of a Safety for Indian Women Title.[3] The findings contained within this Title reference government research documenting the victimization of Indian women as a population.[4] The Department of Justice reports that the rate of violent victimization of Indian women is higher than for all other populations in the United States.[5] The rate of

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[2] Violence Against Women Act, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (1994), as amended by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000), as amended by the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

[3] *Id.*

[4] *Id.*

[5] See generally Lawrence A. Greenfeld & Steven K. Smith, U.S. Dep't of Justice, American Indians and Crime (1999); Steven W. Perry, U.S. Dep't of Justice, American Indians and Crime 1992-2002 (2004); Calli Rennison, U.S. Dep't of Justice, Violent Victimization and Race, 1993-1998 (2001).

violent crime perpetrated against American Indian females is 2½ times the rate for all females.[6] DOJ further estimates that 1 of 3 American Indian women will be raped;[7] that 3 of 5 will be physically assaulted;[8] and that Indian women are stalked at a rate more than double that of any other population.[9]

This extraordinarily high rate of victimization of American Indian women has no roots in the traditional cultures of Indian nations. To the contrary, written historical records documenting Europeans' first impressions of relationships between Indian women and men indicate that women enjoyed great authority and respect in those societies.[10] Traditional teachings handed down by oral historians of Indian nations confirm these reports—unlike their European counterparts, Indian women frequently had greater authority than men over the home, activities associated with trade, and

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[6] See Steven W. Perry, U.S. Dep't of Justice, American Indians and Crime 8 (2004).

[7] See Patricia Tjaden & Nancy Thoenne, U.S. Dep't of Justice, Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey 22 ex. 7 (2000).

[8] See *id.*

[9] See U.S. Dep't of Justice, Domestic Violence and Stalking, The Second Annual Report to Congress Under the Violence Against Women Act (1997); U.S. Dep't of Justice, Stalking and Domestic Violence, The Third Annual Report to Congress Under the Violence Against Women Act (1998).

[10] Jacqueline Agtuca, "Beloved Women: Life Givers, Caretakers, Teachers of Future Generations" 5-6, in Sharing Our Stories of Survival, Native Women Surviving Violence (2007).

property. Indeed, many Indian nations held the mother's role to be culturally and structurally central to their societies.[11] Reflecting these social norms and the spiritual beliefs underlying them, Indian women traditionally experienced a high degree of safety.[12]

Against this backdrop, it is perhaps unsurprising that an extremely high percentage of violent victimizations of American Indian women today are committed by non-Indians. The Department of Justice reports that white or black offenders committed 88% of all such violent victimizations during the years 1992-2001.[13] Nearly 4 in 5 Indian victims of sexual assault described the offender as white.[14]

Many of these non-Indians live in tribal communities on various tracts of land including tribal trust land, trust land allotted to individual Indians and inherited by tribal members, and fee land owned both by Indians and non-Indians. Under federal law, tribal courts lack jurisdiction over crimes committed in tribal communities by non-Indians.[15] Accordingly, the exercise of tribal courts'

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[11] *Id.*

[12] *Id.*

[13] See Steven W. Perry, U.S. Dep't of Justice, American Indians and Crime, 1992-2002, at 8 (2004).

[14] See *id.* at 9. *Cf.* Lawrence A. Greenfeld & Steven K. Smith, U.S. Dep't of Justice, American Indians and Crime 8 (1999) (noting that among American Indian victims, "75% of the intimate victimizations and 25% of the family victimizations involved an offender of a different race," a much higher percentage than among victims of all races as a whole).

[15] See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). See also 18 U.S.C. §§ 1152, 1162 (providing for limited

*civil* jurisdiction in protection order proceedings, divorce and child custody proceedings, and tort actions for personal injuries is frequently fundamental to the protection of American Indian women.[16] This is particularly true given that the nearest state court forum is often hundreds of miles from the victims' homes and communities.[17]

## II. TRIBAL COURTS HAVE JURISDICTION TO ISSUE PROTECTIVE ORDERS AGAINST NON-INDIAN PERPETRATORS OF DOMESTIC VIOLENCE.

With the passage of the Full Faith and Credit (FFC) provision of the Violence Against Women Act (VAWA) in 1994, Congress unambiguously recognized Indian tribes' civil jurisdiction to issue protection orders in cases of domestic violence, dating violence, sexual assault, and stalking.[18]

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state jurisdiction over crimes in Indian country; otherwise, federal jurisdiction and federal criminal law applies).

[16] Although domestic violence protection orders are more frequently used, sexual-assault-specific orders may be the only remedy available to an Indian woman who is sexually assaulted by a non-Indian, particularly if the federal or state authorities decline to prosecute. See Jessica E. Mindlin & Liani Jean Heh Reeves, National Crime Victim Law Institute, Rights and Remedies: Meeting the Civil Legal Needs of Sexual Violence Survivors 21-36 (2005).

[17] For example, the Hopi Tribal Court issues orders of protection preventing future abusive conduct by non-Indian perpetrators toward Hopi women. The Hopi Indian Tribe is located in two counties of northeastern Arizona. The distance from the Hopi Reservation to the Navajo County Court is one hundred miles and to the Coconino County Court is one hundred fifty miles.

[18] Indian tribes have taken steps to codify congressional intent

VAWA's full faith and credit provision relied upon the inherent authority of Indian tribes and clarified that tribal courts had the authority to issue civil protection orders. Moreover, by consistently and repeatedly using the phrase "State, Indian tribe, or territory" in that provision, Congress recognized that Indian tribal courts have inherent civil jurisdiction equal to that of state courts in this context.[19]

The joint authority conferred on tribal and state courts by VAWA is crucial to maintaining the safety of Indian women in the states and Indian tribes. Because non-Indians cross tribal-state lines daily, and because some of these travelers enter tribal lands with the intention to commit domestic violence, dating violence, sexual assault, and stalking, state courts and tribal courts are dependent upon each other to ensure that the integrity of their protection orders are upheld, no matter where the offenders travel. Thus, VAWA recognizes the authority and the

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through the enactment of laws permitting jurisdiction over non-Indians for acts of domestic violence against their members. See, *e.g.*, Eastern Band of Cherokee Indians, Cherokee Tribal Code pt. II § 1-2(a) (Cherokee Court shall have jurisdiction over all civil actions involving the personal, property, or legal rights of its members). The Eastern Band of Cherokee Indians has actively pursued and permitted domestic violence restraining orders against non-Indian perpetrators in accordance with its laws. See *id.* pt. II ch. 50B (Cherokee Domestic Violence Prevention).

[19] "Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced ... as if it were the order of the enforcing State, Indian tribe, or territory." 18 U.S.C. § 2265(a).

responsibility of both Indian tribes and the states to hold non-Indian offenders accountable in civil cases addressing domestic violence, dating violence, sexual assault, and stalking. When the offense occurs on state land, state courts will have the civil jurisdiction to sanction and enjoin the offender. VAWA's FFC provision expresses Congress's view that when an offense occurs on tribal land, tribal courts have the civil jurisdiction to sanction and enjoin the non-Indian offender. Without this symmetry, non-Indian offenders in tribal lands could not be held accountable—and the safety of Indian women would be greatly undermined.[20]

In the Violence Against Women Act of 2005, Congress provided additional assistance to Indian tribes in their ongoing efforts to protect women. Title IX of VAWA 2005 states that "the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women."[21] This "Federal trust responsibility" includes recognizing and supporting tribal courts' civil jurisdiction over non-Indian perpetrators of domestic violence, sexual assault, dating violence,

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[20] In 2000, with the reauthorization of VAWA, Congress explicitly recognized that Tribal courts have "full civil jurisdiction" for purposes of the Act: "a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe." 18 U.S.C. § 2265(e).

[21] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, Title IX § 901, 119 Stat. 2960 (2006).

and stalking. One of the Title's avowed purposes was "to strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes committed against Indians."[22] This Court should not undermine the will of Congress, but should maintain the civil jurisdictional powers of tribal courts in domestic violence, dating violence, sexual assault, and stalking cases.

## III. ACCEPTING PETITIONER'S CRAMPED READING OF *MONTANA* v. *UNITED STATES* COULD CAST DOUBT ON TRIBAL COURT AUTHORITY OVER NON-INDIAN PERPETRATORS OF DOMESTIC VIOLENCE.

As set forth above, under current law there can be no question that tribal courts have authority over non-Indian perpetrators of domestic violence. Petitioner's arguments, however, threaten to undermine that authority. *Amici* urge the Court to ensure that its decision preserves tribal courts' critical authority over non-Indian abusers.

Petitioner advances an unjustifiably restrictive reading of *Montana* v. *United States*, 450 U.S. 544 (1981). *Montana* recognizes the tribes' inherent sovereign power to 1) "regulate, through taxation, licensing, *or other means*, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," and 2) "exercise civil authority over the conduct of non-Indians on fee lands within [a] reservation when that conduct threatens or has some direct effect on

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[22] *Id.* § 902(2).

the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-566 (emphasis added).

Petitioner contends that the first *Montana* exception is inapplicable because there was not a "consensual relationship" between the parties here. Pet. Br. 31-35. Petitioner also makes the novel argument that the "consensual relationship" test does not apply to tribal courts' exercise of civil jurisdiction—that tribes may *regulate* certain non-Indian behavior, but may not exercise civil *adjudicatory* authority over claims arising from consensual relationships. Pet. Br. 26-28. Relatedly, petitioner claims that tort law is not an "other means" of regulation under *Montana*. Pet. Br. 35-39.

Respondent and other *amici* amply demonstrate the fundamental flaws with petitioner's arguments on the facts before this Court. See, *e.g.*, Resp. Br. 39-47 (demonstrating that petition had a longstanding consensual relationship with tribal members); NCAI Br. 27-29 (showing why petitioner's argument for a regulatory/adjudicatory divide "makes no practical sense"); Resp. Br. 51-53 (common law tort claims represent a form of regulation). We do not repeat those arguments here; instead we write to emphasize that accepting petitioner's arguments would have particularly troubling implications in the context of domestic violence.

In circumstances involving domestic violence, tribal court judges rely on the *Montana* exceptions for authority over non-Indian abusers. See, *e.g.*, Northwest Tribal Court Judges Association, Tribal Court Bench Book for Domestic Violence Cases (1999) (citing the existence of a "consensual

relationship" or threat to tribe's "health or welfare" as "key[s]" to jurisdiction). In such circumstances, it makes no sense to require the kind of literal, express consent to tribal authority that petitioner urges here. Domestic relations are not subject to written stipulations and express consents to jurisdiction. They are, however, perhaps the most common "consensual relations" between Indians and non-Indians in Indian country, and should provide grounds for the exercise of jurisdiction over non-Indian perpetrators of domestic violence.

In originally enunciating the consensual relationship test, this court found it "immaterial that respondent is not an Indian":

> He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

*Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-566 (1903) (citations omitted). The Court has since repeatedly reaffirmed the tribes' authority over the conduct of nonmember defendants on the reservation and in consensual, voluntary relationships with tribes and tribal members, including in *Montana* itself. See, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983) (upholding tribal authority over nonmembers hunting and fishing on the reservation); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982) ("a tribe has no authority over a nonmember *until the nonmember enters tribal lands*

*or conducts business with the tribe*") (emphasis added). See also *Montana*, 450 U.S. at 557 (a tribe may regulate nonmembers' hunting and fishing on land belonging to the tribe).

Petitioner suggests that only contractual relationships rise to the level of "consensual relationships" regulable under *Montana*, see, *e.g.*, Pet. Br. 34-35, and that the tribal court therefore should not have exercised jurisdiction over the discrimination cause of action in this case. That approach, however, would not only be inconsistent with cases like *Mescalero Apache Tribe* and *Montana*, but could also seriously erode tribal court authority over non-Indians in domestic relations cases. A non-Indian who, for example, resides with a tribal member in Indian country and who commits an act of domestic violence against that person should be subject to tribal jurisdiction under the principles of *Montana*, notwithstanding lack of proof that the non-Indian "contracted" with the tribal member.

This is particularly true given the congressional actions set forth in Part II of this brief. Again, Congress has recognized, through the enhancement of tribal court civil authority to enforce foreign domestic violence protection orders in 18 U.S.C. § 2265, that tribal courts have broad civil authority over non-Indians who commit domestic violence against Indian women in Indian communities. Yet Congress obviously knew that these non-Indians have not expressly consented to this tribal authority. This Court should take care not to undermine Congress's efforts to enhance tribal courts' authority in this area. In short, the discrimination cause of

action alleged by respondents in the tribal court arose directly from the "consensual relations" between the parties to this case. Similarly, an act of domestic violence committed by a non-Indian against an Indian arises directly from the abuser entering into a "consensual relationship" with the victim within tribal jurisdiction.

* * *

The civil authority of tribal courts over non-Indians provides protection for American Indian women victimized by domestic violence, sexual assault, dating violence and stalking. Over thirteen years of federal legislation under VAWA has recognized the important role of such civil authority to manage potentially violent perpetrators and prevent future abuse of the victim, her family, and community. Limiting the authority of tribal courts over non-Indian perpetrators would undermine Congress's intent and strip American Indian women of any remedy within tribal jurisdiction to prevent future abuse and address other related matters such as divorce and child custody.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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# APPENDIX

## STATEMENTS OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *amici curiae* in support of respondents.

**The National Network to End Domestic Violence (NNEDV)** is a not-for-profit organization incorporated in the District of Columbia in 1995 (www.nnedv.org). The mission of NNEDV is to create a social, political, and economic environment in which violence against women no longer exists. A network of state domestic violence coalitions, representing over 2,000 member programs nationally, NNEDV serves as the voice of battered women and their children and those who provide direct services to them. NNEDV was instrumental to Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000, and 2005, and has worked in conjunction with tribal organizations to authorize and implement Title IX (Safety for Indian Women) of the Violence Against Women Act of 2005. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

**Sacred Circle, National Resource Center to End Violence Against Native Women** is a South Dakota not-for-profit organization incorporated in 1996 (www.sacred-circle.com). The mission of Sacred Circle is to change individual and institutional beliefs that support violence against all women. Sacred Circle provides technical assistance, training, and consultation to Indian Tribes and organizations in the development of strategies and responses to violence against women. Sacred Circle has been

involved with tribal law enforcement, prosecution and courts in the development of best practices in domestic violence and sexual assault response. Sacred Circle continues to formulate new approaches and innovative legal and program responses on a tribal, state, and national level to create solutions to ending domestic violence. Sacred Circle was instrumental in providing information about the outrageous rates of violence against Indian women and making recommendations that led to the enactment of Title IX, Safety for Indian Women, in the Violence Against Women Act of 2005. We have heard of many cases of women, both Indian and non-Indian, who live within the jurisdiction of tribal courts that depend on the tribal courts' issuance of protective orders as part of their safety plans. Additionally, we know that tribal courts also provide other civil remedies such as torts actions, divorce decrees, child custody, that are best provided for at the local, tribal level.

The **Alaska Native Women's Coalition** is a not-for-profit organization incorporated in the state of Alaska in 2001. The mission of ANWC is to provide advocacy and services to women seeking safety and services through our program. The Alaska Native Women's Coalition has been working to create dialog with community members around solutions to eliminate the violence at the community level. In Alaska, communities range from 150 or fewer to several thousand persons when located in a heavily populated region, with no local presence of the state to protect victims in many instances. The civil remedies available through tribal court are imperative to women living with no other resource at the local level. The first tribal court was established

in 1932, and many have followed, protecting the health, wellbeing, and safety of tribal citizens in Alaska. Most tribes have historical documentation concerning the integrity of their citizens including issuing protection orders, child custody issues, and other civil issues. Our program serves approximately 800 native and non-native women per year. As direct service providers, we routinely work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking protection orders through our tribal court's civil jurisdiction.

The **Alaska Network on Domestic Violence & Sexual Assault (ANDVSA)** is a coalition of domestic violence and sexual assault programs across Alaska. ANDVSA has 19 member organizations and was incorporated in the state of Alaska in 1978. The mission of ANDVSA is to work to end violence against women through statewide partnerships, advocacy, and direct services. Additionally, ANDVSA plays an instrumental role in advocating for laws and policies that affect victims of domestic violence/sexual assault and their children.

**Bridges Against Domestic Violence** is a not-for-profit organization incorporated in the state of South Dakota in 1993. The mission of the program is to provide advocacy and services to women seeking safety and services through our program. Our program serves approximately 412 women per year. As direct service providers, we routinely work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction. Domestic violence survivors

living on tribal lands rely on tribal courts for protection from abuse and violence.

**Cangleska, Inc.**, is a not-for-profit and tribally chartered organization incorporated in the state of South Dakota and the Oglala Sioux Tribe in 1996 and 1997, respectively. The organization operates within the exterior boundaries of the Oglala Sioux Tribe and is composed of Oglala tribal members. The mission of Cangleska is to create individual and institutional change necessary to support ending violence against native women. Cangleska operates in four locations across the reservation and provides a multitude of programs including two shelters for women who are battered and their children, domestic violence probation services, outreach advocacy, men's re-education, women's treatment, supervised visitation, and civil legal services. Cangleska attorneys and advocates assist native and non-native women who seek legal protections through various tribal court systems throughout the region. Cangleska is nationally known for its innovative programs and work to end violence against women. The Pine Ridge Reservation is located in the rural and remote southwest corner of South Dakota upon which the effects of poverty are extreme. Many of the women seeking safety and advocacy services are limited by availability of transportation, communication capabilities, housing, and other needs. The battered women that we serve rely on the tribal court's civil jurisdiction to address domestic and sexual violence, stalking, and dating violence against women.

**Clan Star, Inc.**, is a not-for-profit organization incorporated in the Eastern Band of Cherokee

Indians in 2001 (www.clanstar.org). The mission of Clan Star is devoted to improving justice to strengthen the sovereignty of Indigenous women through legal, legislative, and policy initiatives, and, education and awareness. Clan Star provides technical assistance, training and consultation to Indian Tribes and organizations in the development of public policy strategies addressing violence against women. Clan Star was instrumental in the development of public policy that led to the enactment of Title IX, Safety for Indian Women in the Violence Against Women Act of 2005. Over the past 13 years since the implementation of VAWA, Tribes have developed the infrastructure for tribal justice system components to provide safety to women within tribal jurisdiction. Many tribal domestic violence codes have been developed. Personnel and training of tribal law enforcement, tribal courts, prosecution, probation, and batterers treatment program personnel have been supported. At the tribal level, efforts are coordinated to create a system of safety for women seeking safety and protection within the tribal jurisdiction.

**Crisis Intervention Shelter Service, Inc.** is a South Dakota not-for-profit organization incorporated in 1991. The mission of the program is to provide advocacy and services to women seeking safety. Our program serves approximately 310 women annually, including through **Crisis Intervention Shelter Service Faith Outreach Office**. We work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction. Domestic

violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Domestic Violence Safe Options Services, Inc.**, is a not-for-profit organization incorporated in South Dakota in 1990. The mission of the program is to provide advocacy and services to women seeking safety and services through our program. Our program serves approximately 300 women per year; this number does not include their children. As direct service providers, we routinely work with the tribal court and other tribal justice system providers to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction.

**Faith Trust Institute** is a not-for-profit organization incorporated in Washington State in 1977. The mission of Faith Trust Institute is to provide education and training to faith-based organizations addressing domestic violence and serving as advocates for battered women. As educators and advocates, we support efforts to enhance the safety of Indian and non-Indian women seeking relief through any tribal court's civil jurisdiction. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Family Circle Crisis Center** is a not-for-profit organization incorporated in The Lower Brule Sioux Tribe in 1996. The mission of the program is to provide advocacy and services to women seeking safety. The program serves approximately 230 women per year. As direct service providers, we routinely work with the tribal court and other tribal justice system components to enhance the safety of

Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction.

The **Family Violence Prevention Fund** is a not-for-profit organization incorporated in the state of California in 1989. The FVPF mobilizes concerned individuals, children's groups, allied professionals, women's rights, civil rights, and other social justice organizations to join the campaign to end violence through public education/prevention campaigns, public policy reform, model training, advocacy programs, and organizing. Founded in 1980, the FVPF has worked to end violence against women and children in the U.S., Indian country, U.S. territories, and around the world. The FVPF strives to prevent violence within the home and in the community, and to help those whose lives are devastated by violence, because everyone has the right to live free of violence. The FVPF routinely works with tribal courts and other tribal justice system components to enhance their service to and the safety of Indian and non-Indian women seeking relief through tribal courts' civil jurisdiction. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **First Nations Women's Alliance** is a not-for-profit organization incorporated in the state of North Dakota in 2007. As a coalition of domestic violence and/or sexual assault programs operating on tribal lands within the state of North Dakota, the First Nation's Women's Alliance has four member organizations with two potential new member organizations. The mission of the organization is to support its members with capacity building and strategic planning including but not limited to: board

development, leadership/professional development, technology systems, volunteer recruitment, data collection, grant writing/skill building, financial management, resource development, networking, and communications. The First Nations Women's Alliance promotes a strong tribal criminal justice response to domestic violence and will work to provide law enforcement and prosecution training about meeting the needs of victims. The First Nations Women's Alliance will work with Indian tribes and its programs to implement best practices and seek innovative solutions that will enhance the safety of all women residing on Indian reservations. Women within the tribal court jurisdiction utilize civil orders of protection to prevent future abuse in crimes of domestic violence, sexual assault, stalking and dating violence. Women also utilize tribal courts to address divorce, custody, and other tort claims.

The **Fort Berthold Coalition Against Domestic Violence** is a not-for-profit organization located within the exterior boundaries of the Fort Berthold Reservation. The mission of the Fort Berthold Coalition Against Domestic Violence is to provide advocacy and services to women seeking safety and services through our program. Our program serves approximately 196 women per year, this number does not include their children. As direct service providers, we routinely work with the tribal court and other tribal justice system providers to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction.

The **Home for Women and Children** is a not-for-profit organization serving the Navajo

Reservation since 1975. The Home for Women and Children provides safety, shelter, food, advocacy, educational living skills, legal support, counseling, transportation, and networking. Native women suffer from extreme domestic violence and sexual assault. It is absolutely vital to the safety of Indian women that the civil jurisdiction of the tribal courts remains intact for these purposes. Women within tribal court jurisdiction utilize civil orders of protection to prevent future abuse in crimes of domestic violence, sexual assault, stalking and dating violence. Women further u lize tribal could authority to address divorce, custody, and other tort claims.

The **Hopi-Tewa Women's Coalition to End Abuse (HTWCEA)** is an extension of the Hopi Women's Coalition, which had been founded in 1996 by a grassroots effort of several Hopi women concerned about, among other family-related issues, violence against Hopi and Tewa women. The primary mission of the HTWCEA is to provide safety and support to women against whom domestic abuse, sexual assault and stalking has been perpetrated. Congress has recognized the civil jurisdiction of tribal courts to issue protective orders against non-Indians. The HTWCEA routinely collaborate with the Hopi Tribal Justice Community to enhance the safety of all women, Indian and non-Indian alike, seeking relief in the Hopi Tribal Court. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Maliseet Domestic Violence and Sexual Assault Response Program** is a domestic violence and sexual assault program operating on tribal lands

in Aroostook County, Maine. The Program has been serving victims of domestic violence in the Maliseet community since 1998. The Program promotes a strong tribal criminal justice response to domestic violence and provides law enforcement and prosecution training about meeting the needs of victims. Women within tribal court jurisdiction utilize civil orders of protection to prevent future abuse in crimes of domestic violence, sexual assault, stalking and dating violence. Women further utilize tribal court authority to address divorce, custody, and other tort claims.

**Mending the Sacred Hoop Inc.** is a Minnesota non-profit organization committed to strengthening the voices and vision of Native peoples. We work to end violence against Native women and children while restoring the safety, sovereignty, and sacredness of Native women. The safety and sovereignty of women is the core of our work; we carry in our hearts the understanding passed on to us by our ancestors—the inherent status of Native women as sacred. Our work to restore this status focuses on the elimination of all forms of violence against Native women. We work from a social change perspective that relies on the grassroots efforts of all our relations to restore the leadership of Native women. Mending The Sacred Hoop provides training, support, resources, and leadership to tribal communities across the country in the development of programs to protect the safety and sovereignty of Native women. Over the past 13 years since the implementation of VAWA Tribes have developed the infrastructure for tribal justice systems components to provide safety to women within tribal jurisdiction. Many tribal domestic violence codes have been

developed. Personnel and training of tribal law enforcement, tribal courts, and prosecution, probation and batterers treatment program personnel have been supported. At the tribal level, we have coordinated our efforts and worked to create a system of safety for women seeking safety and protection within our tribal jurisdiction.

The **Minnesota Indian Women's Sexual Assault Coalition** is a non-profit organization incorporated in Minnesota in 2004. The vision of the Minnesota Indian Women's Sexual Assault Coalition is to provide safety and justice for Native women through the teachings of our grandmothers. Our mission statement is: "Through unity we will strengthen our voices and build resources to create awareness and eliminate sexual violence against Indian women and children. We apply our efforts toward influencing social change and reclaim our traditional values that honor the sovereignty of Indian women and children." Our coalition has approximately 33 individual and organizational members throughout Minnesota. Many of our members are direct service providers and routinely work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Minnesota Program Development, Inc. (MPDI)** is a not-for-profit organization incorporated in the state of Minnesota in 1980. The mission of MPDI is to provide advocacy and services to women seeking safety. Our program serves approximately

400 women per year. As direct service providers, we routinely work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction.

The **Mita Maske Ti Ki** is a not-for-profit organization incorporated in the state of South Dakota in 2000. The mission of the program is to provide advocacy and services to women seeking safety and services through our program. Our program serves approximately 53 women per year. As direct service providers, we routinely work with the tribal court and other tribal justice system programs to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction.

The **Montana Coalition Against Domestic and Sexual Violence (MCADSV)** is a not-for-profit organization incorporated in the state of Montana in 1984 (www.mcadsv.com). Founded in 1984, MCADSV's mission is to support and facilitate networking among our member organizations while advocating for social change in Montana. The issues before the Court are incredibly important to victims of domestic and sexual violence in Montana. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Native American Community Board** is a not-for-profit organization incorporated in South Dakota in (1986). The mission of the program is to provide advocacy and services to women seeking safety and services through our program. Our program serves approximately 450 women per year.

As direct service providers, we routinely work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction.

The **National Center on Domestic and Sexual Violence** is a not-for-profit organization incorporated in the state of Texas in 1998. The mission of the National Center is to design, provide, and customize training and consultation; influence policy and promote collaboration; and enhance diversity with the goal of ending domestic and sexual violence. Our agency provides technical assistance to approximately three million visitors annually to our web site (www.ncdsv.org) and provides 36 training events per year. As technical assistance providers, we routinely work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through tribal courts. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **National Coalition Against Domestic Violence (NCADV)** was formed in 1978 and provides technical assistance, general information and referrals, community awareness campaigns, and public policy advocacy at the national level. NCADV has participated in many amicus briefs over the years on issues related to victims of domestic violence, especially where the issues involve the safety of victims. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Native Women's Society of the Great Plains Reclaiming Our Sacredness** is a coalition of domestic violence and/or sexual assault programs operating on tribal lands in the Great Plains region. The Society has twenty-two member organizations. The Society incorporated in the state of South Dakota in 2007. The mission of the organization is to support its members in formulating innovative legal solutions to ending violence against native women. The Society promotes a strong tribal criminal justice response to domestic violence and provides law enforcement and prosecution training about meeting the needs of victims. The Society works with Indian tribes to implement best practices and seek innovative solutions that will enhance the safety of all women residing on Indian reservations. Women within tribal court jurisdiction utilize civil orders of protection to prevent future abuse in crimes of domestic violence, sexual assault, stalking and dating violence. Women further utilize tribal could authority to address divorce, custody, and other tort claims.

The **New Mexico Coalition Against Domestic Violence (NMCADV)** is a not-for-profit organization incorporated in the state of New Mexico (www.nmcadv.org). Founded in 1981, its mission, along with the ultimate vision of social justice, is to work to end violence against women through partnerships, advocacy, and direct services. The New Mexico Coalition Against Domestic Violence also plays an instrumental role in advocating for laws and policies that affect battered women and their children. Within New Mexico, there are twenty-two tribes. Indian women and non-Indian perpetrators cross these jurisdictional boundaries on a daily basis.

We rely on the ability and authority of tribal and state courts to issue and enforce tribal and state protection orders in an effort to keep women and our communities safe.

The **Niwhongwh xw E:na:wh Stop the Violence Coalition, Inc.** is a not-for-profit organization incorporated in the Hoopa Valley Tribe in 2002. The mission of Niwhongwh xw E:na:wh Stop the Violence Coalition is to provide advocacy and services to women seeking safety through our programs. Our program serves approximately 96 women annually. As direct service providers, we routinely work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through our court's civil jurisdiction.

The **Ohitika Najin Win Oti** is a not-for-profit organization incorporated in South Dakota in 2008. The mission of the program is to provide advocacy and services to women seeking safety. Our program serves approximately 250 women annually. As direct service providers, we routinely work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

**Our Grandmother's House** is a not-for-profit organization incorporated in the state of Alaska in 2001. The mission of Our Grandmother's House is to provide advocacy and services to women seeking safety and services through our program. Our program serves approximately 200 of women per

year. The Alaska Native Women's Coalition Safe Home, "Our Grandmother's House," in Fairbanks, Alaska has utilized the Full Faith and Credit provision to successfully obtain protection orders when women from remote villages flee their perpetrators, seeking shelter in other communities such as Fairbanks. In addition, the provision has protected our children, as our state courts honor the provisions regarding custody of children in tribal domestic violence custody orders. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Pauma Tribe (the Nine Tribes) and Strong Hearted Native Women's Coalition (SHNWC)** is a coalition of domestic violence and/or sexual assault programs operating on tribal lands in the Pacific region. The SHNWC incorporated in the state of California in 2007. The mission of the organization is to support its members in formulating innovative legal solutions to ending violence against native women. The Nine Tribes promote a strong tribal criminal justice response to domestic violence and provides law enforcement and prosecution training about meeting the needs of victims. The Nine Tribes work with Indian tribes to implement best practices and seek innovative solutions that will enhance the safety of all women residing on Indian reservations. Women within tribal court jurisdiction utilize civil orders of protection to prevent future abuse in crimes of domestic violence, sexual assault, stalking, and dating violence. Women further utilize tribal could authority to address divorce, custody, and other tort claims.

**The Pennsylvania Coalition Against Domestic Violence (PCADV)** is a private non-profit organization that provides services and advocacy on behalf of victims of domestic violence and their children. The first domestic violence coalition in the nation, PCADV is a membership organization of 61 programs offering shelters, hotlines, counseling programs, legal and medical advocacy projects, and transitional housing projects for victims of abuse and their children. For more than thirty years, PCADV has provided training and technical assistance to domestic violence programs, private and government agencies, policy-makers, attorneys, the courts, law enforcement and criminal justice personnel, health care providers, the media, and the general public on issues of domestic violence. The **National Resource Center on Domestic Violence (NRC)** is a project of PCADV. It was founded in 1993 as a key component in a national network of domestic violence resources and provides support to all organizations and individuals working to end violence in the lives of victims and their children through technical assistance, training and information on response to and prevention of domestic violence. PCADV and the NRC share a mission to eliminate personal and institutional violence against women thorough programs providing support and safety to battered women, direct services, public information and education, systems advocacy, and social change activities. PCADV and the NRC are firmly committed to preserving and promoting a strong tribal civil and criminal justice response to domestic violence that enables tribal courts to respond to victims of domestic violence who reside on tribal lands.

Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Qualla Women's Justice Alliance** is a group of Cherokee and other tribal women that are formally recognized by Cherokee Tribal Council Resolution No. 68 (1999). The Qualla Women's Justice Alliance is committed to improving the response of the Cherokee tribal justice system and coordination of direct service providers to victims of domestic violence, sexual assault, stalking, and dating violence on Cherokee trust lands located in Cherokee, North Carolina. The Alliance provides leadership and, more importantly, Cherokee cultural perspective to the non-Indians that are employed by our tribe, are the actual direct service providers, and who reside on our lands. Likewise, our tribal lands have been and continue to be visited by thousands of tourists and visitors each year since the 1940's. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Sacred Heart Family Violence Center/Women's Shelter** is a not-for-profit organization incorporated in South Dakota in 1985. The mission of the program is to provide advocacy and services to women seeking safety and services. Our program serves approximately 1,000 women each year. As direct service providers, we routinely work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction. Domestic violence

survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

**Safe and Fear-Free Environment, Inc. (SAFE)** is a not-for-profit organization incorporated in the state of Alaska in 1981. The mission of SAFE is to prevent violence, provide services, and promote the welfare of victims of domestic violence, sexual assault and related abuse in the Bristol Bay region. SAFE's service area stretches over 40,000 square miles (roughly the size of the state of Ohio) and encompasses six sub-regions and three court districts including Dillingham (Curyung Tribe) where the main shelter facility is located, and the 33 tribes and villages of the Bristol Bay region in Southwest Alaska. There are no roads and few resources. There are no connecting roads and the few docks and harbors are closed by winter ice for much of the year. Transport is by small bush plane, snow machine and/or skiff. Less than a third of our villages have any resident law enforcement. The Region is home to about 8,000 permanent residents and includes people from each of the three main groups of indigenous people in Alaska—Indians (Athabascan), Aleuts and Eskimo—with Yupik Eskimo being predominant. Alaska Natives comprise about 65% of the population base in hub areas like Dillingham and approximately 90-95% in outlying villages. Eighty-five percent of the persons served by SAFE are Alaska Native. SAFE provides advocacy and services to 15-20% of all adult women in Bristol Bay in any given year, and direct services to at least 500 individual women, children and men. Domestic violence, sexual assault, substance abuse and chronic interpersonal violence are endemic in our region. SAFE is one of the few resources our people have and the tribal courts and

tribal justice systems are our greatest allies for prevention, intervention, and effective responses to protect the lives of victims of violence. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Shelter of Safety (SOS)** is a not-for-profit organization incorporated in the Eastern Band of Cherokee Indians in 2006. Shelter of Safety is a native-specific Domestic Violence Transitional Housing Program located on the Qualla Boundary in Cherokee, NC. The primary goal of SOS is to fill the current gap between crisis shelter and permanent housing on our tribal lands and create public awareness. This program provides stable transitional housing and support services to battered women. Housing is essential to securing safe and healthy lives on and around the Eastern Band of Cherokee Qualla Boundary. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

**Sicangu Coalition Against Sexual & Domestic Violence** is a not-for-profit organization incorporated in South Dakota in 2008. The mission of Sicangu Coalition Against Sexual & Domestic Violence is to provide advocacy and services to women seeking safety and services. Our program serves approximately 400 women annually. As direct service providers, we routinely work with the tribal courts and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through tribal courts. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

**The South Dakota Coalition Against Domestic Violence and Sexual Assault** is a South Dakota not-for-profit organization incorporated in 1978, which represents 22 domestic violence and/or sexual assault programs operating on state and tribal lands. The mission of the organization is to provide support, resources, and technical assistance to member programs that are responsible for providing direct advocacy and resources to individual women who are battered and/or raped in their own communities. Women within tribal court jurisdiction use civil protection orders to prevent future abuse in crimes of domestic violence, sexual assault, stalking and dating violence. Women further use tribal court authority to address divorce, custody, and other tort claims.

The **Southwest Indigenous Women's Coalition (SWIWC)** is a nonprofit, statewide Native American domestic violence and sexual assault coalition founded in 2005 and incorporated in the state of Arizona in 2006. The mission of the SWIWC is to promote justice and safety for battered and sexually assaulted Native women through the development and/or enhancement of the leadership skills of Native women in Arizona, and, developing partnerships, providing outreach, technical assistance and training to Tribes; domestic violence, sexual assault and other related programs; and tribal communities as a whole. The SWIWC advocates for and supports a strong tribal criminal justice response to domestic violence and works with partners to provide law enforcement and prosecution training to meet the needs of domestic violence and sexual assault victims. Native women look to their tribe for legal protection against their offenders and

without it live in fear of their lives. Women within tribal court jurisdiction utilize civil orders of protection to prevent future abuse in crimes of domestic violence, sexual assault, stalking and dating violence. Women further utilize tribal court authority to address divorce, custody, and other tort claims.

The **Spirit Lake Victim Assistance Program** is a not-for-profit organization incorporated in the Spirit Lake Tribe in 1997. The mission of the Spirit Lake Victim Assistance program is to provide advocacy and services to women seeking safety and services. We serve approximately 300 women per year, routinely working with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Tribal Law and Policy Institute (TLPI)** (www.tlpi.org) is an Indian owned and operated non-profit corporation organized to design and deliver education, research, training, and technical assistance programs which promote the improvement of justice in Indian country and the health, well-being, and culture of Native peoples. TLPI has an extensive track record concerning the effective provision of training and technical assistance in Indian Country, especially training and technical assistance addressing violence against Native women issues. These direct service providers routinely work with the tribal court and other tribal justice system components to enhance the safety of

Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Utah Domestic Violence Council (UDVC)** is a not-for-profit organization incorporated in the state of Utah in 1993. The mission of the UDVC is to create a state where domestic violence is intolerable. UDVC provides public awareness and education, training, advocacy and a toll-free 24 hour/daily domestic violence linkline with the assistance of a 36-member council. In working with 22 local domestic violence coalitions, 16 licensed domestic violence shelter programs and 30 victim advocate programs, UDVC provides 8 training events per year, maintains a web-based training site and provides an annual conference reaching over 600 participants yearly. These events and our collaborative work on statewide domestic violence initiatives include work with Indian advocates and support for victims within the five Indian tribes in Utah. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Victims of Violence Intervention Program** is a not-for-profit organization incorporated in South Dakota in 1998. The mission of the program is to provide advocacy and services to women seeking safety and services through our program. Our program serves approximately 500 women per year. As direct service providers, we routinely work with the tribal court and other tribal justice system components to enhance the safety of

Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction.

**Washington State Coalition Against Domestic Violence (WSCADV)** is a not-for-profit organization incorporated in Washington State (www.wscadv.org). Founded in 1990, its mission, along with the ultimate vision of social justice, is to work to end violence against women through partnerships, advocacy and direct services. WSCADV also plays an instrumental role in advocating for laws and policies to assist battered women and their children, such as the Violence Against Women Acts of 1994, 2000, and 2005, and advocating for the safety of domestic violence victims in the court system in particular to improve the enforcement of domestic violence protection orders across jurisdictional lines and working to enact full faith and credit laws recognizing protection orders. There are 33 federally recognized tribes, bands, and nations as well as 7 unrecognized tribes, bands, and nations in Washington State. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

**Washington State Native American Coalition Against Domestic Violence and Sexual Assault-Women Spirit Coalition** is a not-for-profit organization incorporated in Washington State in 2006. The mission of our Intertribal Coalition is to provide consultation and education to urban, rural, tribal and non-tribal entities on behalf of Native women and survivors in Washington State (encompassing 160,000 American Indian/Alaska Native populations and 33 federally Recognized tribes). Although we are not direct service providers,

we routinely work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction. The state of Washington has recently passed legislation that would give tribal police officers authority to arrest non-Indians and would require the development of formal relationships with county law enforcement agencies to regain criminal jurisdiction over non-Indians on our lands. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

**White Buffalo Calf Woman Society** is a not-for-profit organization incorporated in the state of South Dakota in 1978. The mission of White Buffalo Calf Woman Society, Inc. is to provide advocacy and services to women seeking safety and services through our agency. Our agency provides services to approximately 400 women and 800 children per year. As a grassroots woman's organization located on the Rosebud Sioux Reservation in the state of South Dakota, we work with tribal woman and non-Indian woman who seek services from us. Our agency routinely works with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through our tribal court's civil jurisdiction. The White Buffalo Calf Woman Society, Inc. provides services in a five county area that includes Todd, Mellette, Tripp, Gregory and Lyman counties. White Buffalo Calf Woman Society has utilized the FFC provision to successfully obtain protection orders when women from these counties who are fleeing from their perpetrators, seeking shelter for their safety off the Rosebud Sioux Reservation or their small rural town

on other tribal reservations or in the larger cities. In addition, the FFC provision has protected our children, as our tribal court honors the provisions regarding custody of children in tribal domestic violence custody orders.

**Wiconi Wawokiya, Inc.** is a not-for-profit organization incorporated in the state of South Dakota in 1982. The mission of the program is to provide advocacy and services to women seeking safety and services. The program serves approximately 250 women annually. As direct service providers, we routinely work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through our tribal courts. Domestic violence survivors living on tribal lands rely on tribal courts for protection from abuse and violence.

The **Wisconsin Coalition Against Domestic Violence** is a Wisconsin not-for-profit organization founded in 1978 whose members include battered women, formerly battered women, domestic abuse programs, and persons committed to ending domestic violence. Our mission is to end violence against women through partnerships, advocacy, and direct services. We play an instrumental role in advocating for laws and policies to assist battered women and their children, such as the Violence Against Women Acts of 1994, 2000, and 2005. For the past six years, we have also led statewide efforts to research and analyze domestic violence homicide cases. We have also worked consistently to ensure that the civil and criminal justice system is sensitive and responsive to the needs of victims, including by regularly training

law enforcement, probation agents, judges, prosecutors, and civil and defense attorneys.

**The Women's Advisory Committee for the Sault Ste. Marie Tribe of Chippewa Indians Advocacy Resource Center** is a grass root group of Ojibwa and other tribal women that was formed to give direction and guidance to the Sault Ste. Marie Tribe of Chippewa Indians Advocacy Resource Center. We are not a formal group, but our group consists of Indian women who are concerned about the safety of women and their children in our communities. We advocate within our tribal communities to assist the development of shelter and advocacy programs in an effort to achieve justice and safety for women. The mission of the Women's Advisory Committee is to make positive, life-saving changes in our tribal communities for families experiencing abuse. Many members of the committee are enrolled members of the Sault Ste. Marie Tribe of Chippewa Indians, which is located in the Eastern Upper Peninsula of Michigan covering seven counties (Alger, Mackinac, Chippewa, Schoolscraft, Marquette, Delta, and Luce). By virtue of our location and integration within these counties, many of our tribal members are married to non-Indians. Currently, we have nine housing sites located in those counties. Our tribe has several economic development enterprises that seek employment of both Indians and non-Indians. The Tribe currently employs approximately 2,500 persons, with 50% of employees being non-Indians. We are a small/medium tribe and many of the tribe's employment opportunities are extended to non-Indians. Domestic violence survivors living on tribal

lands rely on tribal courts for protection from abuse and violence.

The **Women's Circle** is a not-for-profit organization incorporated in Sisseton, South Dakota on the Lake Traverse Reservation, commonly known as the Sisseton-Wapheton Oyate, for over 17 years. The mission of the program is to provide advocacy and services to women seeking safety and services through our program. Our program serves approximately 51 women per year. As direct service providers, we routinely work with the tribal court and other tribal justice system components to enhance the safety of Indian and non-Indian women seeking relief through out tribal court's civil jurisdiction.